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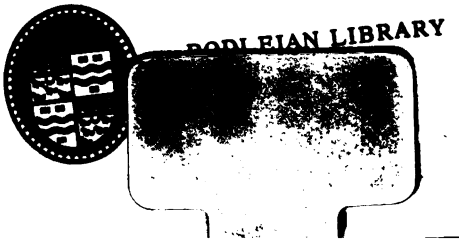

THE

CITY OF LONDON

Tithe Cases,

&c. &c.

5045

CASES

RELATING TO THE

TITHES

OF THE

CITY OF LONDON;

DETERMINED

IN THE SEVERAL COURTS OF LAW AND EQUITY,

AND IN THE

High Court of Parliament,

FROM THE DATE OF THE DECREE MADE IN PURSUANCE OF THE STATUTE OF 37 HEN. 8. C 12, TO THE PRESENT TIME;

TO WHICH IS ADDED

THE STATUTE AND DECREE,

Faithfully transcribed from the Entry made in the Register Book of the Bishop of London, preserved in St. Paul's Cathedral.

AND ALSO

THE FIRE ACTS,

By THOMAS GEORGE WESTERN, Esq.

OF THE MIDDLE TEMPLE.

London:

PRINTED FOR HENRY BUTTERWORTH, LAW BOOKSELLER, 7, FLEET STREET, BETWEEN THE TEMPLE GATES; LUCAS HOUGHTON, 119, CHANCERY LANE; AND THOMAS AND JOHN RLVEY, 30, CASTLE STREET, HOLBORN.

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An Acte lymytyng an Order for payment of Tithes within the Citie of London.

BE it Enacted by thauctoritie of this p'sent Parliament that all and ev'y the Citesens and Inhabitauntes of the Citie of London and Suburbes within the lib'ties of the same, shall at this p'sent tyme of Ester nexte comying pay unto the Curates of the said Citie and Suburbes all suche and like sommes of money for tithes oblacions and other duities as the said Citezens and Inhabitauntes by thorder of my Lorde Chauncellour and other of the Kinges moost honorable Counsaill (and the Kinges p'clamacion[a]) paied or ought to haye paied by force and v'tue of the said Order at Ester that was in the yere of our Lorde God M.D.XXXV. And the same paymentes so to continue frome tyme to tyme untill suche tyme as any other order or lawe shal be made publissed ratified and confirmed by the Kinges Highnes and the XXXII p'sonnes by his Grace to be named as well for the full stablisshement conc'nyng the payment of all Tithes oblacions and other duities of the Inhabitauntes within the said Citie and Suburbes within the lib'ties of the same, as for the making

Tithes in London shall be paid under the Order of the Lord Chancellor, &c. until further order made.

(a) Interlined in the original Act.

of

of other Eccliasticall Lawes of this Realme of Englond, and that ev'y psonne denying to pay as is aforesaid shall by the commaundement of the Maier of London for the tyme beyng be comitted to Prison there to remayne untill suche tyme as he or they have agreed with the Curate and Curates for the said Tithes oblacions and other Duities as is aforesaid.

37° HEN. 8°. Cap. 12. A. D. 1545.

An Acte for TITHES in London.

Page 998. Taken verbatim from the entry in the Register Book of the Bishop of London preserved in St. Paul's Cathedral, *Bonner*, A. D. 1539 to 1559, fo. lxxxix.

Disputes as to Tithes in London.

WHERE of late tyme contenc'on strife and variaunce hath risen and growen within the Cittie of London and the Lib'tyes, of the same betwene the Parsons Vicars and Curats of the said Cittie and the Cittizens and Inhabytaunts of the same for and conc'ninge the payments of tithes oblac'ons and other duetyes within the said Cittye and Lybtyes; for appeasinge whereof a certeine ordre and decree was made thereof by the moste reverent father in God Thomas Archebusshoppe of Caunterburie Metropolytan Chief Primate of all Englonde, Thomas Audeley Knight Lorde Audeley of Walden and then Lorde Chauncellou' of Englonde now decessed, and other of the Kings Majesties Most Honorable Privye Counsell, and also the Kings lres patents and p'clamacon was made thereof and directed to the said Citezens conc'ninge the same;

Whereupon

Whereupon it was after enacted in the Parliament holden at Westm' by progacõn the fourth day of Februarie in the xxvij^th yere of the Kinges Majesties most noble raigne, by auctoritie of the same parliament, that the Cetizens and Inhabitauntes of the same Cittie shulde at Ester then next comynge paye unto the Curats of the said Cittie and Suburbes all suche and like sõmes of money for Tithes oblacõns and other duetyes as the saide Cittezens and Inhabitauntes by the Ordre of the saide late Lorde Chauncelor and other of the King's most honorable Counsell, and the King's saide p'clamacion paide, or ought to have paide by force and vertue of the said Ordre, at Ester w^ch was in the yere of our Lorde God 1535; and the same payments so to contynue from tyme to tyme untill suche tyme as any other ordre or Lawe shoulde be made published ratified and confirmed by the Kings Highnes and the two and thirty p'sons by his Grace to be named, as well for the full stablishment concerninge the payment of all Tithes oblacõns and other dueties of the Inhabitaunts within the saide Cittie Suburbes and Liberties of the same, as for the makinge of other Eccilasticall Lawes of this Realme of Englande; and [that *a*] every person denying to paye as is aforesaid shulde by the comaundement of the Maire of London for the tyme beinge, be cõmytted to prison, there to remayne untill suche tyme as he or they shulde have agreed with the Curate or Curats for their saide Tithes Oblacõns and other duetyes as is aforesaid; as in the said Acte more playnly appeareth: Sithen w^ch Acte divi'se variauncs contencõns and striffes are newly risen and growen betwene the saide P'sons Vicars and Curats, and the saide Cittezens and Inhabitaunts touchinge the pay-

Recital of Stat. 27 H. 8, c. 21, respecting payment thereof.

Further disputes relating thereto referred to the Archbishop of Canterbury and others.

(*a*) then O.

ments of the Tithes Oblacons and other dueties by reason of c'tein wordes and termes specified in the saide ordre, w^ch^ are not so playnelye and fully sett furthe, as is thought convenient and mete to be; For appeasinge whereof, as well the saide Parsons Vicars and Curats as the saide Cittezens and Inhabitaunts have compromytted and put themselfes to stonde to such ordre and decree touchinge the p'misses as shall be made by the saide right reverent father in God Thomas Archbusshoppe of Caunterbury Metropolitane and Primate of Englonde, the right honorable Sir Thomas Wryothesley Knight, Lorde Wriothesley and Lord Chauncellour of Englonde, the right honorable Thomas Duke of Norff Lorde Treasourer of Englonde, the right honorable Sir Will^m^. Paulett Knight, Lord Seynt John Lorde President of the Counsell and Lorde Great Maister of the King's most honorable Housholde, the right honorable Sir John Russell Knight, Lorde Russell and Lorde Privy Seale, the right honorable Edwarde Erle of Hertforde Lorde Great Chamberlayne of Englonde, the right honorable John Vycount Lysley High Admyrall of Englonde, Sir Richarde Lyster Knight Chief Justice of Englonde, Sir Edward Mountague Knight Chief Justice of the Comen Bench at Westm'. and Sir Roger Cholmeley Knight Chief Baron of the Excheker: For a fynall end and conclusion to be had and made touchinge the p'misses for ever, and to thentent to have a full peace and p'fect ende betwen the saide parties their heirs and succesSors, touchinge the saide Tithes oblacons and other dueties forever; Be it enacted by Auctoritie of this p'sent parliament that suche ende order and direccon as shalbe made decreed and concluded by the forenamed Archebushoppe Lordes and Knights, or any six of them before the first day of Marche next ensuynge, of for and concerning the payments of the Tithes Oblacons and

Award of the said Archbishop, &c. to be made before 1st March ensuing, and to be enrolled in Chancery, shall be valid as an Act of Parliament.

and other dueties within the saide Cittie and the Liberties of the same, and enrolled in the King's Highe Courte of Chauncerie of Recorde, shall stonde remayne and be as an Acte of Parliament, and shall bynde as well all Cittezens and Inhabitaunts of the saide Cittie and Liberties for the tyme beinge, as the saide Parsons Vicars Curatts and their Sucessors forever, accordinge to theffect purport and intent of the said ordre and decree so to be made and enrolled, and that everie p'son denyinge to paye any of his their Tithes oblacõns or other dueties contrarie to the saide Decree so to be made, shall by the comaundment of the Maire of London for the tyme beinge, and in his defaulte or negligence by the Lorde Chauncellor of Englonde for the tyme beinge, be comytted to prison, there to remayne till such tyme as he or they have agreed with the Curate and Curats for his or their said Tithes Oblacõns and other dueties as is aforesaide.

Penalty on refusal to pay Tithes according by Imprisonment.

The DECREE. (a)

AS touching the paymente of Thithes in the Citie of London and the Liberties of the same, It is fullie ordered and decreed, by the moost Reverende

Decree dated 24 Feb. 1545-6.

(a) This Decree is not inserted in the earliest printed copies of the Statute of this year, It does not form part of the Act as entered on the Enrollment of the Statute in Chancery; nor has it been found in any-wise enrolled in Chancery; nor is it now annexed to the Original Act preserved at the Parliament Office. It appeared in the alphabetical Col-

Father

Father in God Thomas Archebyshopp of Cantorbury Primate and Metropolitane of all Englonde, Thomas Lorde Wryothesley, and Lorde Chauncellor of Englande, William Lorde Seint John, President of the Kinges Majesties Counsaill and Lord Greate Maister of his Highnes Housholde, John Lorde Russell Lorde Prevy Seall, Edward Erle of Hertforde, Lorde Greate Chamberlayne of Englande, John Viscounte Lysle, Highe Admyrall of Englande, Richarde Lyster Knyght, Chief Justice of Englande, and Roger Cholmeley Knighte, Chief Baron of his Graces Eschequier, this present xxiiijth day of February Anno dñi secundum cur's et computationem Ecclie Anglicane millimo quingentessimo quadragesimo quinto, according to the Statute in suche case lately provyded; That the Citizens and Inhabituants of the saide Citie of London, and liberties of the same, for the tyme being, shall yerely fore ever without fraude or coveyne pay their

Tithes in London shall be rated on the rents at 1s. 4½d. per 10s and 2s. 9d in the Pound.

lection of Statutes, Printed under the name of Rastall, so early as 1579; and being afterwards inserted in the Collection of Statutes edited by Pulton in 1618, has been continued in subsequent editions to the present time.

It is now printed from an Entry in a Register-Book of the Bishop of London, preserved in Saint Paul's Cathedral, *Bonner*, A.D. 1539 to 1559, fo. lxxxix. immediately after an Entry of the Act of Parliament, to which it refers by the following marginal note: "Decretū interpoitū intuitu Actus predicti". From the Copy of an Indorsement on the Decree, also entered in the same Register, it appears that the Decree, signed and sealed, was delivered on the 25th of February, the day after the date thereof, to Bonner then Bishop of London, by the Archbishop, &c. whose signatures appear to the Decree; and that the Bishop on the same 25th day of February delivered it to his Registrar, to be safely kept in the registry. *The Original Instrument however has not been found.*

Tythes

Tythes to the Parsons, Vicars, and Curates of the saide Cittie, and their successorꝰ for the tyme beinge, after the rate hereafter folowinge, That ys to wytte; Of every tenne shillings rent by yere of all and every house and housꝭ, shoppes, warehouses, cellers, and stables, and every of them, within the saide Cytie and liberties of the same, Sixtene pence half peny; and of every Twentye Shillinges rente by yere of all and every such house and houses, shoppes, warehouses, cellers, and stables, and every of them wᵗin the said Cytie and Liberties Two Shillings and nyne peence; And so above the rente of twentie shillings by yere, ascendinge from tenne shillings to tenne shillings, according to the rate aforesaide. *Item.*—That wheare anny lease is or shalbe made of anny dwellinge house or houses, shoppes, warehouses, cellers or stables, or of any of them, by fraude or coveine, refvinge lesse rente thenne hathe bene accustumed, or is, or that any suche leasse shalbe made wᵗoute anny rent refved upon the same, by reasonne of any Fyne or Income paied beforehande, or by any other fraude or covein, that then in every suche case the tenᵃnte or fermor tenᵃnte or fermorꝰ therof shall pay for his or theyre Tythes of the same after the rate aforesaide, according to the quantytie of suche reent or reents as the same house or houses, shoppes, warehouses, cellers or stables or any of them were laste letten for wᵗout fraud or covein, before the makinge of such leasse.

When rent, &c. not duly reserved the rate shall be on the value.

Item.—That every owner or owners, Inheryto' or inheryto'ꝰ of anny Dwelling howse or houses, shoppes warehouses, sellers or Stables, or anny of them wᵗin the the said Cytie and Liberties, inhabityng or occupyng the same, hymself or themselfs shall pay after suche rate of Tythe as ys abovesaide, after the quantitie of such yerely rente as the same was last letten for withowte

Owners shall be rated on the value.

Lessees underletting any part of a house shall pay the whole Tithe.

withowte frawde or coveyn. *Item.* if any peresonn or psonnes have taken or hereafter shall take any mese or mansion plase by lease, and the taker or takers thereof his or theyre executo^{rs} or assignees deothe or shall inhabite in parte thereof, and have or hathe within eighte yeres laste paste before this ordree, or hereafter will or shall lette owte the resydue of the same, that then in suche Case, the principall Fermo^{r} or Fermo^{rs}, or firste taker or takers thereof, his or theyre executo^{rs} or assignes shall pay his or theyre Tythes, after the rate aforesaide, according to his or theyre quantitie therein. And that his or theyre executo^{rs} assignee or assignes, shall pay his or theyre Tythes, after the rate abovesaide, according to the quantitie of his or theyre Reente by yere. And that yf anny personne or p'sonnes have or shall take dyverse mansion houses, shoppes, warehouses, cellers, or stables in oone lease, and letteth or shall let owte oon or moore of the saide houses, and keapeth or shall keape oone or moore in his or theyre owne handes, and inhabitieth or inhabiten in the same, That then the saide taker or takers, and his and theyre executo^{rs} or assignes shall pay his or theyre Tythes, after the rate above said, according to the quantitie of the yerelye rente of suche mansion house or houses reteyned in his or theyre handes; And that his or theyre assigne or assignes of the resydue of the saide mansion house or houses shall paye his or theyre tythes, after the rate above saide according to the quantie of theyre yerely reentes. *Item.* yf suche fermo^{r} or fermo^{rs} or his or theyre assignes of anny mansion house or houses, warehouses, shoppes, cellers, or stables, hathe at any tyme w'in eighte yeres laste paste, or shall hereafter let over all the saide mansion house or houses conteynyd in his or theyre leasse to oon parsonne or to dyverse personnes, That then thinhabitauntes, Lessies or occupiers

Lessees of several houses underletting part, shall pay for houses retained, and underlessees for houses taken.

Assignees of the whole of houses &c. underlet shall pay the Tithes.

cupiers of them, and of every of them, shall pay theyre Tythes, after the rate of suche reents as the saide Inhabitaunts, lessies, or occupiers, and theyre assigne or assignes been or shalbe chardged w'all without frande or covein. *Item.* yf any Dwellinge house within eighte yeres laste paste was or hereafter shalbe converted into a Warehouse, stoorhouse, or suche like, Or yf a warehouse, stoorhouse, or suche lyke, w'in the saide eighte yeres, was or hereafter shall be converted into a dwellinge house, That then thoccupier or occupiers thereof shall pay Tithes for the same, after the rate above declared of mansion house reentes.

Dwellings converted into Warehouses &c. shall pay as Dwellings.

Item, that wheare anny personne shall demyse any Dyehouse or Brewhouse, w', ymplements convenyent and necesfie for dyeng or brewinge, refvinge a reente upon the same, as well in respecte of suche implements as in respecte of suche dyehouse or brewehouse, that then the Ten'nte shall pay his Tythes after suche rate as is above saide, the thyrde penny abated; And that every principall house or houses, with key or wharf, having any Crane or Gibet belonginge to the same shall pay after lyeke rate of theyre reentes, as ys aforesaide, the thyrde peny abated, and that other Wharfs belonginge to hous' having noo crane or gibet, shall pay for theyre tythes as shalbe payed for mansion hous' in forme aforesaide. *Item* That wheare any Mansion house with a shoope, stable, warehouses, wharf w'. craane, tymber yarde, teyntree yarde, or gardeyne bilonginge to the same, or as parcells of the same, ys or shalbe occupied togyuther, that yf the same be hereafter severed or devyded, or at anny time w'in eighte yeres laste paste were severed or devyded, that then the fermor or fermors occupier or occupiers thereof, shall pay suche tythes as above saide for such shoppes, stable, warehouses, wharf w'. craane, tymber yarde, teynter yarde, or gardeyne aforesaide so severed or devyded, after the rate of theyre severall reente thereupon

Dyehouses, Brewhouses &c let with Implements &c. shall pay Tithes on two thirds of the rent.

How Tithes shall be paid where Houses with Shops &c. rated together are afterwards divided.

Tithes shall be payable quarterly,

thereupon refvēd. *Item*, that the saide Citizeins and Inhabitaunts shall pay theyre Tythes quarterlye, that ys to say, at the feaste of Ester, the Natyvytie of Saincte John Bapteist, the feaste of Saincte Mighele, Tharchaungell, and the Natyvytie of our Lord by even porcions. *Item*, that everye howsholder payenge tenne shillings reent or above, shall for hym or herself be dyschardged of theyre fowre offerying dayes, but his wyef childreen svaⁿts or others of theyre famylye, takying theyre rightes of the Churche at Ester, shall pay two peence for theyre fowre offeringe days yerelye. Provided allwayes and yt ys decreed, that yf anny house or houses, whiche hathe been or hereafter shalbe letten for tenne shillings rent by yere or more, be or hathe at anny tyme within viij yeres last passed, or hereafter shalbe devyded & leassed into small parcells or members, yelding lesse yerelye reent thanne tene shillings by yere, that thenne the owner or owners if he or they dwell in any part of such house, or ells the principall Lessee or Lessees yf the Owner or Owners doo not dwell in some parte of the same, shall fromhensforthe pay for his or theyre Tythes after suche rate of reente as the same house was accustumed to be letten for before suche devysion or devyding into parties or membres, and the underfermoʳ and fermoᵐ lessee or lessees, to be dyschardged of all Tythes for suche small parcells, partes, or membres reented at lesse yerely reente then tenne shillings by yere, wᵗout frawde or coveyne, payeng two peence a peece yerely for their fowre offeryng dayes. Provided alway, and yt ys decreed, that for such gardeyns as appertcyne not to any Mansion house, and whiche any personne or persones holdeth or shall holde in his or theyre hands for pleasʳ or to his owne use, That thenne the personne so holdinge the same shall pay noo Tythes for the same; but if any personne or persones whiche holdeeth or shall holde any suche

Offerings by the Families of persons paying Tythes.

Tythes of Houses underlet in Tenements under 10s. shall be paid by the owner or principal Lessee.

Offerings of the Undertenants

No Tythes for Gardens unless exceeding half an acre and yielding profit, &c.

suche gardeyne, coteynyng half an acree or moore, doothe or shall make any yerely proffitt thereof by way of sale, that thenne he or they shall pay Tythes for the same after suche rate of his reente as ys herein fyrste above specified: *Provided* also that yf any suche gardeynes now beinge of the quantitie of half an acree or more, be hereafter by frawde or coveyne, devyded into any leesse quantitie or quantities, thenne to pay Tythes accordinge to the rate abovesaide. *Provided* allwayes, that this Decree shall not extende to the houses of greate men, or noblemen, or noble women, keepte in theyre owne handes, and not letten owte for anny reente, whiche in tyme paste hathe payed noo Tythes, so longe as they shall soo continewe unletten; nor to any Hawles of crafte or companyes, so longe as they be keapte unletton; so that the same Hawles, in tyme paste, have not used to pay anny Tythes. Pv'ided allwayes and yt ys decreed that this present ordree and decree shall not in anywyse extende to binde or chardge any sheedes, stables, cellars, tymber yardes, ne teyntree yardes, which were never parcell of anny Dwellinge house, ne appertaynynge or belonginge to any Dwellinge house, ne have accustuned to pay any tythes, but that the said Cytyzeins and Inhabitauntes shall thereof bee quiet of payment of any Tythes, as yt hathe been used and accustomed. *Provided* allso, and yt ys decreed, that where less sõme than after the rate of syxteene peence halfpenny in the teene shillinge rente, or lesse some thanne two shillinges and nyne peence in the twentie shillings reent, hathe been accustumed to bee payde for Tythes, that thenne in such plaacies the saide Citezeins and Inhabitaunts shall pay but onelye after such raate as hathe been accustumed. *Item*, yt is allso decreed, that if anny varryaunce controversie or streif, doo or shall hereafter arryse in the saide Cytie, for noone paymente of

Exception for the houses of Noblemen and Halls of Companies.

Exceptions for Sheds, Stables, &c. not part of Houses.

Exception where less rates than 2s. 9d. have been usually paid.

Disputes as to Tythes shall be decided by the Mayor.

of anny Tythes, or if anny varyaunce or doubte arryse upon the true knowledge or devysion of anny reent or Tythes within the liberties of the said Cytie, Or (yf *a*) any extent or assessment thereof Or [yf] any doubte arryse upon any other thinge conteyned within this Decree, That then upon complaint made by the partie greved, to the Mayor of the Cytie of London for the tyme beinge, the said Mayor by thadvyse of counsaill, shall call the said parties before hym, and make a fynall ende in the same, with coostes to be awarded at the discretion of the saide Mayor and his assistaunts, accordinge to thyntent and purporte of this present Decree.

or in his default by the Lord Chancellor.

And if the said Mayor make not an ende thereof within two monythes after complaint to hym made, or yf any of the said parties fynde themselfs greved, that then the Lorde Chauncellor of Englande for the tyme beinge, upon complaint to hym made, within three monythes thenne next folowinge, shall make an ende in the same, with such coostes to be awarded as shall be thoughte convenient accordinge to thentent and purporte of this saide Decree. *Provided* allway, that if anny person or personnes take any Tenement for a less reente thenne it was accustumed to be letten for by reason of any greate ruyn or decaye, brennyng or suche like occasions or mysfortunes, That then auche personne or personnes his Executors or assignes shall pay Tythes onelye after the rate of the reente reserved in his or theyre Leasse, and none otherwayes, as longe as the same leasse shall endewir.

Proviso for low rents of Houses decayed.

T. Cantuarien.—Thomas Wryothesley Cancel.—William Seint John.—J. Russell.—E. Hertford.—John Lisle.—

(*a*) of Printed Copies.

A.D

A. D. 1670 & 1671.

22° & 23°. CAR. II. c. 15.

An Act for the better settlement of the maintenance of the Parsons Vicars and Curates in the Parishes of the Citty of London burnt by the late dreadfull Fire there.

Rot. Parl. 22° & 23° C II p. 2. nu 3.

WHEREAS the Tythes in the City of London were leavyed and paid with great Inequality and are since the late dreadfull Fire there in the rebuilding of the same by takeing away of some Houses, altering the Foundations of many and the (new [a]) erecting of others soe disordered that in case they should not for the time to come be reduced to a certainty many controversies and suits of Law might thence arise.—Bee it enacted by the Kings most Excellent Majesty by and with the advice and consent of the Lords Spirituall and Temporall and the Commons in this present Parlyament assembled and by the authoritie of the same That the Annuall certaine Tythes of all and every Parish and Parishes within the said Citty of London and the Libertyes thereof whose Churches have been demolished, or in part consumed by the late Fire, and which said Parishes by vertue of an Act of this present Parlyament entituled an Additional Act for the Rebuilding of the Citty of London, uniteing of Parishes and rebuilding of the Cathedrall and Parochiall Churches within the said

Reasons for passing this act.

(a) Interlined on the Roll.

Citty

Citty, remaine and continue single as heretofore they were or are by the said Act annexed or united into one Parish respectively, shall be as followeth (that is to say) The annuall certaine Tythes or Summe of Money in lieu of Tythes.

Of the Parish of Allhallowes (Lumber)*b*) Streete one hundred and ten pounds.....	cx^{l}
Of Saint Bartholomew Exchange one Hundred pounds	c^{l}
Of Saint Bridget alias Brides One hundred and twenty pounds	cxx^{l}
Of Saint Bennet Finck One hundred pounds	c^{l}
Of Saint Michaell Crooked Lane one hundred pounds	c^{l}
Of Saint Christopher One hundred and twenty pounds....	cxx^{l}
Of Saint Dionis Back Church one hundred and twenty pounds	cxx^{l}
Of Saint Dunstan in the East Two hundred pounds....	cc^{l}
Of Saint James Garlicke hythe one hundred pounds....	c^{l}
Of Saint Michaell Cornhill one hundred and forty pounds....	cxl^{l}
Of Saint Michael Bassishaw one hundred thirty and two pounds and eleaven shillings	cxxxij^{l}-xj
Of Saint Margaret Lothbury one hundred pounds....	c^{l}
Of Saint Mary Aldermanbury One hundred and fifty pounds	cl^{l}
Of Saint Martin Ludgate one hundred and sixty pounds	clx^{l}

(*b*) Lumbard O.

Of Saint Peter Cornhill one hundred and ten pounds .... } cx^{l}

Of Saint Stephen Coleman Streete one hundred and ten pounds .... } cx^{l}

Of Saint Sepulchre Two hundred pounds .... cc^{l}

Of Allhallowes Bread Streete and Saint John Evangelist one hundred and forty pounds .... } cxl^{l}

Of Allhallowes the Great and Allhallowes the Lesse Two hundred pounds .... } cc^{l}

Of S^{t} Albanes Wood Street and Saint Olaves Silver Streete one hundred and seaventy pounds .... } clxx^{l}

Of Saint Anne and Agnes and [S^{t}.*a*] John Zachary one hundred and forty pounds } cxl^{l}

Of Saint Augustine and Saint Faith One hundred seaventy and two pounds .... } clxxij^{l}

Of Saint Andrew Wardrobe and Saint Anne Blacke Fryers one hundred and forty pounds .... } cxl^{l}

Of Saint Antholin and Saint John Baptist one hundred and twenty pounds .... } cxx^{l}

Of Saint Bennet, Gracechurch, and Saint Leonard Eastcheape one hundred and forty pounds .... } cxl^{l}

Of Saint Bennet Pauls Wharfe and Saint Peter Pauls Wharfe one hundred pounds } c^{l}

Of Christ Church and Saint Leonard Foster Lane Two Hundred Pounds .... } cc^{l}

Of Saint Edmund the King and Saint Nicholas (Acows*b*) one hundred and eighty pounds .... } clxxx^{l}

Of Saint George Buttolph Lane and Saint Buttolph Billingsgate one hundred and eighty pounds .... } clxxx^{l}

a Interlined on the Roll.

b Acons O.

Of

Of Saint Lawrence Jury and Saint Magdalen Milke Streete one hundred and twenty pounds .... } cxx*l*

Of Saint Magnus and Saint Margaret new Fish Streete one hundred and seaventy pounds.... .... } clxx*l*

Of Saint Michael Royall and Saint Martin Ventry one hundred and forty pounds } cxl*l*

Of Saint Mathew Friday Streete and Saint Peter Cheape one hundred and fifty pounds } cl*l*

Of Saint Margaret Pattons and Saint Gabriel Fen Church one hundred and twenty pounds .... } cxx*l*

Of Saint Mary at Hill and Saint Andrew Hubbard Two hundred pounds .... } cc*l*

Of Saint Mary Woolnoth and St Mary Woolchurch one hundred and sixty pounds.... .... } clx*l*

Of Saint Clement Eastcheape and Saint Martin Orgars one hundred and forty pounds.... .... } cxl*l*

Of Saint Mary Abchurch and Saint Lawrence Pountney one hundred and twenty pounds.... .... } cxx*l*

Of Saint Mary Aldermary and Saint Thomas Apostles one hundred and fifty pounds.... } cl*l*

Of Saint Mary le Bow Saint Pancras Soper lane and Alhallowes Honey Lane Two hundred pounds .... } cc*l*

Of Saint Mildred Poultry and Saint Mary Cole Church one hundred and seaventy pounds.... .... } clxx*l*

Of Saint Michaell Woodstreeté and Saint Mary Staining one hundred pounds.... .... } c

Of

A. D. 1670 & 1671.

Of Saint Mildred Bread Streete and Saint Margaret Moses one hundred and thirty pounds....	cxxx^{li}
Of Saint Michaell Queen hyth and Trinity one hundred and sixty pounds	clx^{li}
Of Saint Magdalen Old Fish Streete and Saint Gregory One hundred and twenty pounds....	cxx^{li}
Of Saint Mary Somerset and Saint Mary Mounthaw one hundred and ten pounds	cx^{li}
Of Saint Nicholas Cole Abbey and Saint Nicholas Olaves one hundred and thirty pounds....	cxxx^{li}
Of Saint Olave Jury and Saint Martin Ironmonger Lane one hundred and twenty pounds....	cxx^{li}
Of Saint Stephen Walbrooke and Saint Bennet Sheerehog one hundred pounds	c^{li}
Of Saint Swithin and Saint Mary Bothaw one hundred and forty pounds	cxl^{li}
Of Saint Vedast alias Fosters and Saint Michaell Querne one hundred and sixty pounds....	clx^{li}

The said Rate in lieu of Tithes to be paid to Parsons and their successors.

Which respective summes of money to be paid in liew of Tythes within the said respective Parishes and assessed as herein after is directed, shall be and continue to be esteemed deemed and taken to all intents and purposes, to be the respective certaine annual maintenance (over and above Glebes and perquisites, Gifts and Bequests to the respective Parson, Vicar and Curate of any Parish for the time being, or to his or their respective successors or to other Persons for his or their use) of the said respective Parsons, Vicars and Curates who shall be legally instituted inducted and admitted into the respective Parishes aforesaid.

A. D. 1670 & 1671.

II.

Who to make the Assessments and when.

And that the said severall Summes of Money for Tythes may be more equally assessed upon the severall Houses, Buildings and all other Hereditaments whatsoever, within all the said respective Parishes. Bee it enacted by the authoritie aforesaid, That the Alderman of such respective Ward or Wards within the said Citty, wherein any of the said Parishes respectively lye and his or their Deputy or Deputyes, and the cõmon councell men of such respective Ward or Wards, with the Churchwardens and one or more [of the *a*] Parishioners of such respective Parish, wherein the maintenance aforesaid is respectively to be assessed, to be nominated by such respective Aldermen, Deputy Common councell Men and Churchwardens or any five of them, whereof the Alderman or his Deputy to be one, shall at some convenient and seasonable time before the twentyeth day of May in the yeare of our Lorde [God *a*] one thousand six hundred and seaventy one, assemble and meete together [at *b*] some convenient place within every of the respective Parishes in such respective Ward, wherein the maintenance aforesaid is to be assessed, and they or the major part of them soe assembled, shall proportionably assesse upon all houses, Shopps, Warehouses and Cellars, Wharfes, Keyes Cranes, Waterhouses (which Waterhouses shall pay in their respective parishes where they stand and not elsewhere, and Tofts of Ground (remaining unbuilt and all other Hereditaments whatsoever, (except Parsonage and Vicarage Houses) the whole respective Summe by this Act appointed or soe much of it as is more then what each Improprietõr is by this Act enjoyned respectively to allow in the most equall way that the said Assessors

Assessments to be made upon Houses Shops Ground unbuilt on &c.

Proviso for Parsonage Houses &c.

(*a*) Interlined on the Roll.
(*b*) in O.

according

according to the best of their Judgements can make it, which said Assessments shall be made and finished before the fower and twentyeth day of July then next ensuing. A. D. 1670 & 1671.

III Variance arising upon the Assessments to be determined by Lord Mayor and Court of Aldermen.

And be it further enacted by the authority aforesaid, That if any variance or doubt shall happen to arise about any summe soe assessed as aforesaid, or that any Parishioner or Parishioners, or owner or owners of any House, Shopp, Warehouse or Cellar, Wharfe, Key, Crane, Waterhouse, Toft of Ground or other Hereditament within any of the said Parishes, shall finde himselfe or themselves aggreived by the assessing of any summe or summes of Money in manner and forme aforesaid; That then upon complaint made by the party or Partyes agrieved, to the Lord Maior and Court of Aldermen of the said Citty, within fowerteene dayes after notice given to the Party or Partyes assessed of such assessment made, the said Lord Maior and Court of Aldermen summoning as well the party or partyes agreived as the Alderman and such others as made the said assessment shall heare and determine the same in a summary way, and the Judgment by them given shall be finall and without Appeale.

IV A Review if occasion be of any Assessment within three months.

Provided alwayes and bee it enacted, That any assessment or Rate to be made or laid by virtue of this Act, shall or may in all or any the Parishes aforesaid, in like manner be reviewed or altred or laid againe within three moneths after the twenty fowerth day of June one thousand six hundred and seaventy fower, according to the aforesaid rules; and any such assessment or Rate shall or may be againe reviewed or reassessed, within three moneths after the twenty fowerth day of June, in the yeare of our Lord one thousand six hundred eighty one. And that all and every such new assessment and Rate shall be lyable to the

A. D. 1660 & 1670.

like Appeals, as aforesaid and shall be collected leavyed and paid as any other assessment or rate mentioned in this Act may or ought to be. [a]

V. If the Persons appointed by this act refuse to act, then others to be chosen by the Lord Mayor &c.

And if the said Alderman, Deputy Common Councell men and Parishioner or Parishioners soe appointed as aforesaid, shall after summons and requests, made in that behalfe unto them by the Lord Maior and Court of Aldermen, or the Incumbent or Incumbents of any of the said respective Parish or Parishes, refuse and neglect to meete and make such assessment as aforesaid, then it shall and may be lawfull to and for such person or persons as shall be thereunto authorized, and required by the said Lord Maior and Court of Aldermen, to make such assessment as by the said Aldermen, Deputy Common Councell Men, Churchwardens, Parishioner or Parishioners aforesaid, should or ought to have been made.

VI. Three transcripts of Assessments to be made and subscribed by Assessors. One to be returned to Lord Mayor, another to Bishop of Londons Registry, the other to remain in the Vestry.

And be it further enacted by the Authority aforesaid, That the said assessors within ten days after such assessment made, and the respective appeals (if any be) determined shall make three transcripts thereof in Parchment, containing the respective summes to be payable or appointed to be paid out of all and every the premises within any such respective Parish, and subscribe the same under their Hands and within twenty dayes after such subscription as aforesaid, one of the said transcripts shall be returned to the Lord Maior of the City of London, to be kept and preserved by the said Lord Maior in and among the records of the said Citty, for a perpetual memoriall thereof, and another of the said Transcripts shall be returned into the Registry of the Lord Bishop of London, to be kept

(a) Annexed to the original Act in a separate schedule.

and

and preserved as aforesaid; And the other of the said Transcripts shall remaine and be kept in the vestry of such respective [Parish *a*] for a perpetual memoriall as aforesaid. A. D. 1670 & 1671.

VII. Assessments to be paid quarterly to Parson.

And for the surer and better payment of the said respective summes of money, soe to be assessed and taxed towards the raiseing of the said Maintenance of the respective Parsons, Vicars, and Curates of the said respective Parishes as aforesaid; Bee it further enacted by the authority aforesaid, That all and every such respective summe and summes of Money soe to be assessed and taxed as aforesaid towards the raiseing of the said Maintenance of the said respective Parsons, Vicars, and Curates of the said respective Parishes shall be paid to the said respective Parsons, Vicars, and Curates, and their successors respectively at the fower most usual Feasts, (that is to say) at the Annunciation of the Blessed Virgin Mary, the Nativity of Saint John Baptist, the Feast of Saint Michael the Arch Angell, and the Nativity of our Blessed Saviour, or within fourteene dayes after each of the Feasts aforesaid by equall payments, the respective payments thereof to beginne and commence onely from such time and times as the Incumbent or Incumbents of such respective Parish shall begin to officiate or Preach as Incumbent, or Parson in the respective Church belonging to such respective Parish, or in some other convenient place or places in such respective Parish or Parishes, to be nominated or appointed by the Lord Bishop of London for the time being, or by the Arch-Bishop of Canterbury in any place within his peculiars.

Payment to commence from Incumbent officiating.

And

(*a*) Interlined on the Roll.

A. D. 1670 & 1671.

VIII. Impropriators to make the same allowances they did before the Fire.

And in any Parish or Parishes where any Impropriations be, Bee it enacted by the authority aforesaid, that all and every the Improprietor or Improprietors of any of the said Parishes, shall pay and allow what really and bona fide they have used and ought to pay, and satisfye to the respective Incumbent of such respective Parish, at any time before the said late Fire, and the same shall be esteemed and computed as part of the maintenance of such Incumbent, notwithstanding this Act or any Clause or Matter or thing herein contained.

IX. Inhabitants refusing payment.

being lawfully demanded at the house &c.

Lord Mayor may grant warrant to levy the same by distresse.

And be it further enacted, by the Authority aforesaid, that if any the Inhabitants in any the respective Parish or Parishes as aforesaid, shall or doe refuse or neglect to pay to the respective Incumbents aforesaid, of any of the said respective Parishes, any Summe or Summes of Moneys to him respectively payable or appointed to be paid by this Act, or any part thereof contrary to the true intent and meaning of this Act (being lawfully demanded at the House or Houses, Wharfe, Key, Crane, Cellar or other p'misses whereout the same is payable) that then it shall and may be lawfull to and for the Lord Maior of the Citty of London for the time being, upon oath to be made before him of such refusall or neglect, to give and grant out Warrants for the Officer or Person appointed to collect the same, with the assistance of a Constable in the Day time to leavy the same Tythes or Summes of Money, soe due and in arreare, and unpaid, by Distresse and Sale of the Goods of the Party or Partyes soe refuseing or neglecting to pay, restoring to the Owner or Owners, the Overplus of such Goods over and above the said arreares of the said moneys soe due and unpaid, and the reasonable [charge *a*]

(*a*) Charges O.

of

of makeing such Distress which he is to deduct out of the Moneys raised by Sale of such Goods. A. D. 1670 & 1671.

X. If Lord Mayor refuse &c. to execute this act Lord Chancellor or Keeper or two Barons of the Exchequer, may by warrants under their hands and seals appoint Officers &c. to levy by distress &c.

Provided always and bee it enacted, That in case the Lord Maior and Court of Aldermen shall refuse or negclect to execute any of the respective powers to them by this Act granted, or to performe all and every such thing relating either to the assessing or leavying of the respective Summes aforesaid, as they are by this Act authorized and required to performe: That then it shall and may be lawfull for the Lord Chancellour or Lord Keeper of the Great Seal of England, (for the tmẽ being *a*) or any two or more of the Barons of his Majesty's Court of Exchequer by Warrant or Warrants under his or their respective Hands and Seales, to doe and performe what the said Lord Maior and Court of Aldermen according to the true intent and meaning of this present Act, might or ought to have done, and by such Warrant either to impower any Person or Persons to make the respective assessments as aforesaid, or to authorize the respective Officers or Persons appointed to collect the Summes aforesaid, to leavy the same by Distresse and Sale of the Goods, of any Person or Persons that shall refuse or neglect to pay the same in manner and forme aforesaid.

XI. Proviso for Incumbents of united Parishes.

Provided always, and be it enacted That where any of the Parishes within the said Citty have since the late Fire by death or otherwise become vacant, the surviving or remaining Incumbent of (*b*) the other Parish thereto united or therewith consolidated shall have and enjoy and have like remedy to recover the Tythes hereby setled to be paid, as if he had been actually pre-

(*a*) Interlined on the Roll.
(*b*) of O.

A. D. 1670 & 1671.

sented, admitted, instituted and inducted into both the said Parishes since the union and consolidation thereof.

XII. No Court to hold Plea for any duty arising upon this act other than herein mentioned.

Provided alwayes that no Court or Judge Ecclesiasticall or Temporall shall hold plea of or for any the Summe or Summes of Money due and oweing, or to be paid by vertue of this Act or any part thereof, other then the Persons hereby authorized to have Cognizance thereof; Nor shall it be lawfull to or for any Parson, Vicar, Curate or Incumbent to convent or sue any Person or Persons assessed as aforesaid, and refuseing or negclecting to pay the same in any Court or Courts or before any Judge or Judges other then what are authorized and appointed by this Act, for the hearing and determineing of the same in manner aforesaid.

XIII. Proviso for Minor Canons of St. Pauls Parson of St. Gregory's Church as to Tithes &c.

Provided alwayes that it shall and may be lawful to and for the Warden and Minor Canons of Saint Paul's Church, London, Parson and Proprietors of the Rectory of Saint Gregory aforesaid, to receive and enjoy all Tythes and Oblations and Dutyes ariseing or growing due within the said Parish, in as large and beneficiall manner as formerly, they have or lawfully might have done any thing herein to the contrary notwithstanding.

44°. GEORGII III. A.D. 1804.

CAP. LXXXIX.

An Act for the Relief of certain Incumbents of Livings in the City of *London*. [28th *July* 1804.]

"Recital of 22 and 23 *G.* 2. *c.* 15."

'AND whereas, since the passing of the said recited Act the Rectory of the aforesaid Parish of *Saint Christopher* hath, by an Act passed in the twenty-first Year of the Reign of his present Majesty, been united to the Rectory of the aforesaid Parish of *Saint Margaret Lothbury*, and there is now but one Incumbent of the said united Rectories: And whereas the said recited Act hath failed in providing a proper Maintenance for the Parsons, Vicars, and Curates in the said Parishes, inasmuch as the respective Incomes being by the said Act fixed at very low Rates, the same are, by the decreased Value of Money, the enhanced Price of all the Necessaries of Life, and by various other Circumstances peculiarly attached to the Incumbents of the City of *London*, become greatly insufficient for the due Support of their Situation and Character, it hath been therefore deemed expedient for their Relief to make such Alterations in the said in part recited Act as are hereinafter expressed and contained;' be it therefore enacted, by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of 21 G. 3. c. 71.

1804.

The Annual Tythes of the Parishes within the City of London shall be increased as here stated.

of the same, That instead of the Annual Tythes of all and every Parish and Parishes within the City of *London* and the Liberties thereof, whose Churches were demolished or in Part consumed by the Fire mentioned in the said recited Act, the Annual certain Tythes or Sums of money in lieu of Tythes, of and for the Parish and Parishes within the said City and Liberties hereinafter enumerated, shall, from and after the twenty-ninth Day of *September* One thousand eight hundred and four, be as follows; (that is to say,)

Of the Parish of *Allhallows Lombard Street*, two hundred Pounds;

Of *Saint Bartholomew Exchange*, two hundred Pounds;

Of *Saint Bridget* alias *Bride*, two hundred Pounds;

Of *Saint Bennet Fink*, two hundred Pounds;

Of *Saint Michael Crooked Lane*, two hundred Pounds;

Of *Saint Dionis Back Church*, two hundred Pounds;

Of *Saint Dunstan in the East*, three hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint James Garlick Hythe*, two hundred Pounds;

Of *Saint Michael Cornhill*, two hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Michael Bassishaw*, two hundred and twenty Pounds eighteen Shillings and four-pence;

Of *Saint Mary Aldermanbury*, two hundred and fifty Pounds;

Of *Saint Martin Ludgate*, two hundred and sixty-six Pounds thirteen Shillings and four-pence;

Of *Saint Peter Cornhill*, two hundred Pounds;

Of *Saint Stephen Coleman Street*, two hundred Pounds;

Of *Saint Sepulchre*, three hundred and thirty-three Pounds six Shillings and eight-pence;

Of

Of Allhallows Bread Street and *Saint John Evangelist*, two hundred and thirty-three Pounds six Shillings and eight-pence; 1804.

Of *Allhallows the Great* and *Allhallows the Less*, three hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Albans Wood Street* and *Saint Olaves Silver Street*, two hundred and eighty-three Pounds six Shillings and eight-pence;

Of *Saint Anne and Agnes*, and *Saint John Zachary* two hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Augustin* and *Saint Faith*, two hundred and eighty-six Pounds thirteen Shillings and four-pence;

Of *Saint Andrew Wardrobe* and *Saint Anne Blackfriars* two hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Antholin* and *Saint John Baptist*, two hundred Pounds;

Of *Saint Bennet Grace Church* and *Saint Leonard, East Cheap*, two hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Bennet Paul's Wharf*, and *Saint Peter Paul's Wharf*, two hundred Pounds;

Of *Christ Church* and *Saint Leonard Foster Lane*, three hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Edmond the King* and *Saint Nicholas Acons*, three hundred Pounds;

Of *Saint George Botolph Lane* and *Saint Botolph Billingsgate*, three hundred Pounds;

Of *Saint Lawrence Jury* and *Saint Magdalen Milk Street*, two hundred Pounds;

Of *Saint Margaret Lothbury* and *Saint Christopher*, three hundred and sixty-six Pounds thirteen Shillings and four-pence;

Of

1804. Of *Saint Magnus* and *Saint Margaret New Fish Street*, two hundred and eighty-three Pounds six Shillings and eight-pence;

Of *Saint Michael Royal* and *Saint Martin Vintry*, two hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Matthew Friday Street* and *Saint Peter Cheap*, two hundred and fifty Pounds;

Of *Saint Margaret Pattons* and *Saint Gabriel Fen-Church*, two hundred Pounds;

Of *Saint Mary at Hill* and *Saint Andrew Hubbard*, three hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Mary Woolnoth* and *Saint Mary Woolchurch*, two hundred and sixty-six Pounds thirteen Shillings and four-pence;

Of *Saint Clement Eastcheap* and *Saint Martin Orgas*, two hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Mary Abchurch* and *Saint Lawrence Pountney*, two hundred Pounds;

Of *Saint Mary Aldermary* and *Saint Thomas Apostles*, two hundred and fifty Pounds;

Of *Saint Mary le Bow*, *Saint Pancras Soper Lane*, and *Allhallows Honey Lane*, three hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Mildred Poultry* and *Saint Mary Colechurch*, two hundred and eighty-three Pounds six Shillings and eight-pence;

Of *Saint Michael Wood Street* and *Saint Mary Staining*, two hundred Pounds;

Of *Saint Mildred Bread Street* and *Saint Margaret Moses*, two hundred and sixteen Pounds thirteen Shillings and four-pence;

Of *Saint Michael Queenhithe* and *Trinity*, two hundred and sixty-six Pounds thirteen Shillings and four-pence;

Of

1804.

Of *Saint Magdalen Old Fish Street* and *Saint Gregory*, two hundred Pounds;

Of *Saint Mary Somerset* and *Saint Mary Mounthaw*, two hundred Pounds;

Of *Saint Nicholas Coleabby* and *Saint Nicholas Olaves*, two hundred and sixteen Pounds thirteen Shillings and four-pence;

Of *Saint Olave Jewry* and *Saint Martin Ironmonger Lane*, two hundred Pounds;

Of *Saint Stephen Walbrook* and *Saint Benet Sheerhog*, two hundred Pounds;

Of *Saint Swithin* and *Saint Mary Bothaw*, two hundred and thirty-three Pounds six Shillings and eight-pence;

Of *Saint Vedast* alias *Forsters* and *Saint Michael Quern*, two hundred and sixty-six Pounds thirteen Shillings and four-pence.

Declaring the said Sums of Money to be the Annual Maintenance of the Clergy of the City.

II. And be it further enacted, That the said respective Sums of Money to be paid in lieu of Tythes within the said respective Parishes, shall be and continue to be esteemed, deemed, and taken, to all Intents and purposes, to be the respective certain Annual Maintenance (over and above Glebes and Perquisites, Gifts, and Bequests, to the respective Parson, Vicar, and Curate of any Parish for the Time being, or to his or their respective Successors, or to other Persons for his or their Use) of the said respective Parsons, Vicars, and Curates, legally instituted, inducted, and admitted into the respective Parishes aforesaid.

"Power to make Assessments on Houses and other "Buildings, before the 21st *August* 1804, by the Alder- "men and Common Council, and Churchwardens in "such Ward, § 3.—Appeal to the Lord Mayor and "Court

1804. "Court of Aldermen against Assessments, § 4.—As-
"sessments may be altered every seven Years, § 5."

Four Transcripts shall be made and deposited with the Town Clerk, the Bishop of London, and the several Vestries and Incumbents.

VI. And be it further enacted, That the said Assessors within fourteen Days after any Assessment shall have been made, and the respective Appeals (if any be) determined, shall make four Transcripts thereof in Writing containing the respective Sums to be payable or appointed to be paid out of all and every the Premises assessable within such respective Parish, and subscribe the same with their respective Names, and that within twenty Days after such Subscription as aforesaid; one of the said Transcripts shall be sent to the Lord Mayor of the City of *London*, and deposited in the Town Clerk's Office of the said City, and there kept and preserved among the Records of the said City, for a perpetual Memorial thereof; another of the said Transcripts shall be deposited in the Registry of the Consistory Court of the Lord Bishop of *London*, to be kept and preserved as aforesaid; another of the said Transcripts shall remain and be kept in the Vestry of such respective Parish, for a perpetual Memorial as before mentioned; and the remaining Transcript shall be delivered within three Days after such Subscription to the Incumbent of such respective Parish, and the said Assessments shall continue in force and be acted upon until any new Assessment shall be made in pursuance of this Act.

"The said Sums shall be payable by quarterly Pay-
"ments, on the 25th *December*, 25th *March*, 24th *June*,
"and 29th *September* every Year, § 7."

VIII. 'And whereas in certain of the Parishes here-
'in-before named there are Impropriations; and the
'Impropriators

1804.

'Impropriators were, as herein-before is mentioned by 'the said recited Act, directed to pay and allow what 'really and *bona fide* they had used and ought to have 'paid and satisfied to the respectve Incumbents of the 'said Parishes before the said Fire, which said Pay-'ments were to be esteemed and computed as Part of 'the Maintenance of such Incumbents;' be it therefore further enacted, That in the Parishes of *Saint Bridget* otherwise *Saint Bride's*, *Saint Bennet Finck*, *Saint Mary Aldermanbury*, *Saint Stephen Coleman Street*, *Allhallows the Less*, *Christ Church*, *Saint Lawrence Jewry*, *Saint Lawrence Pountney*, and *Saint Mary Cole Church*, the Impropriators shall continue to allow and pay to the respective Incumbents of the same Parishes what they have been accustomed to allow and pay before and since the passing of the said recited Act of the twenty-second and twenty-third Years of the Reign of King *Charles* the Second, which said Sums shall be paid to the Incumbents of the same respective Parishes, in Part of the respective Sums herein-before appointed to be the certain Annual Maintenance of the same respective Incumbents.

Impropriators shall continue to pay what they have been accustomed to pay.

IX. 'And whereas two-third Parts of the Impro-'priate Tythes of the Parish of *Saint Sepulchre* are 'vested in Trustees, in Trust for the Parishioners of 'that Parish; and the Vicar of the said Parish is en-'dowed with the remaining third Part of the said Im-'propriate Tythes;' be it therefore further enacted, That the said Vicar shall, from and after the twenty-ninth Day of *September* One thousand eight hundred and four, receive the full Sum directed by this Act to be paid him for his Maintenance, in lieu of the third Part of the said Impropriate Tythes to which by virtue of his Endowment he is entitled, from the several Inhabitants, of or from or out of, or for, or in respect of the

The Vicar of Saint Sepulchre's shall receive the full Sum directed by this Act, instead of one-third Part of the Impropriate Tythes.

1804. the several Houses, Tenements, and other Hereditaments situated within that Part of the said Parish of *Saint Sepulchre* which lies within the Liberties of the City of *London*, but exclusive of and over and above the third Part of the Tythes to which he is entitled, from the Inhabitants, of or from or out of, or for or in respect of the several Houses, Tenements, or other Hereditaments situate within that Part of the said Parish which lies within the County of *Middlesex*; and that, from and after the said twenty-ninth Day of *September* One thousand eight hundred and four, the said third Part of the said Impropriate Tythes, due from the Inhabitants of or from, or out of or in respect of the several Houses, Tenements, or other Hereditaments situate within that Part of the said Parish of *Saint Sepulchre* which lies within the said Liberties of the City of *London*, shall cease and determine, and be no longer paid or payable.

"for continuing certain Compensations out of the City "Chamber, in lieu of Houses taken down, &c. § 10.— "Money shall be recovered (in case of Refusal of Pay- "ment) by Warrant of a Magistrate, § 11.—If the "Sums assessed shall be paid in Manner after men- "tioned (*See* § 13), they shall not be raised as before "directed, § 12.—Churchwardens, &c. may make "Yearly Assessments with appeal to Court of Alder- "men, § 13, 14.—Sums assessed by the Churchwar- "dens, &c. may be levied by Warrant of a Magistrate, "§ 15.—If the Monies to be assessed by the last men- "tioned Means shall be unpaid for thirty Days after "any Quarterly Day of Payment, the same shall be "raised in the same manner as the first Assessment, "§ 16.—Quakers exempted from being Collectors "under this Act, § 17."

1804.

Powers of the said Act of 22 and 23 C. 2. and the Powers of this Act, vested in the Lord Mayor and Court of Aldermen, or on their Failure in two Barons of the Exchequer.

XVIII. And be it further enacted, That all and singular the Powers and Authorities in and by the said recited Act of the twenty-second and twenty-third Years of King *Charles* the Second, given to and vested in the Lord Mayor and Court of Aldermen of the City of *London*, shall be and the same are hereby from henceforth given to and vested in the said Lord Mayor and Court of Aldermen for the Time being, for and in respect of all and singular the Matters and Things in this Act contained, or by this Act enacted, so far as the Case is or shall be applicable; and that in case the said Lord Mayor and Court of Aldermen shall refuse or neglect to execute any of the respective Powers to them by this Act granted, or to perform all and every such Things relating either to the assessing or levying of the respective Sums aforesaid, as they are by this Act authorised and required to perform, either expressly or by Reference, that then it shall be lawful for any two or more of the Barons of his Majesty's Court of Exchequer, by Warrant or Warrants under their Hands and Seals, to do and perform what the said Lord Mayor and Court of Aldermen, according to the true Intent and Meaning of this Act, might or ought to have done, and by such Warrant either to empower any Person or Persons to make the respective Assessments as aforesaid, or to authorize the respective Officers or Persons appointed to collect such Assessments, to levy the same by Distress and Sale of the Goods of any Person or Persons that shall refuse or neglect to pay the same, in Manner and Form aforesaid.

No Ecclesiastical Court, &c. shall hold Plea of or for any Monies payable under this Act.

XIX. Provided always, That no Court or Judge Ecclesiastical or Temporal, shall hold Plea of or for any the Sum or Sums of Money due or owing or to be paid by virtue of this Act, or any Part thereof, other than the Persons hereby authorized to have Cognizance

thereof, nor shall it be lawful for any Parson, Vicar, Curate, or Incumbent, to convent or sue any Person or Persons assessed as aforesaid, and refusing or neglecting to pay the same, in any Court or Courts, or before any Judge or Judges, other than what are authorized and appointed by this Act for the hearing and determining the same in Manner aforesaid.

TITHE CASES.

1592.
GREEN v. PIPER.

34 ELIZ. A. D. 1592.

GREEN v. PIPER,

Cro. Eliz. 276. *Gwillim* 164.

Houses in *London* part of the possession of one of the greater Abbies shall pay Tithes by 37 H. 8. *Moore*, 912, S.C.

IT was held by the Justices that a house in *London*, which was part of the possession of a priory, that was discharged of paying Tithes of their possessions, yet by the Statute 37 H. 8. c. 12 shall be charged for Tithes according to the ordinance there, for before that Statute no Dwelling House was chargeable for Tithes, because no profit ariseth of it, and only noblemens houses are excepted, and p 35 it was adjudged accordingly and a consultation was granted.

It

1608.

B. R: HIL. 5 JA:

MEADHOUSE *v* TAYLOR,

Noy 130.

IT was holden in a prohibition to a suit in the spiritual court for tithes of rent in London, that by 37 H. 8 c. 12. the suit ought to be before the Lord Mayor of London by complaint in writing, in nature of a *monstrans de droit*, declaring all the title. And if the suit be in the spiritual court, the court of B. R. may grant a prohibition though it hath not power to meddle with them; 2ndly it was resolved, that a reservation by a lessee for life who leases for years to A.; is not sufficient to bind him in the reversion to pay tithes according to that rate; 3rdly that a rent for half a year, and afterwards for another half year, is a yearly rent within the meaning of the decree. And note as the same was *last* let is not intended *last* before the decree but before the d e n a i d of [illegible]

5 JAs.

1608.

5 JAs. 1. B: R.

SKIDMORE AND EIRE, v BELL.

1 *Inst.* 659.

Libel for prohibition.

THE Defendant (the *Parson*) libelled before the *Chancellor* for the Tithes of a house called the *Boar's Head in Bread Street*, the ancient farm-rent whereof was £5. at the time of the said Decrees and after, and that of late a new lease was made of the said house rendering the rent *of* £5 a year and over. That a great Income or fine which was covenanted and agreed to be paid yearly, at the same day that the rent was paid, as a sum in gross, and that so much rent might have been reserved for the said house, as the rent reserved and the sum in gross amounted unto, which reservation and covenant were made to defraud the said parson of the Tithes of the true rent of the said house, which to him did appertain by the purport and true intent of the said Decree, and in this case four points were resolved by the Court.—1st. If so much rent be reserved as was accustomed to be paid at making of the said Decree, (whatsoever fine or income be paid), that the parson can aver no covin, for the words of the decree be "where any lease is or shall be made of any dwelling house by fraud or covin in reserving less then hath been accustomed," so as if the accustomed rent be reserved, no fraud can be alleged, for the fraud by the Decree is when lesser rent, than was then accustomed to be paid is reserved, or if no rent at all be reserved, for then tithes shall be paid according to the rent that then was last before reserved

be

1606.

SKIDMORE AND EIRE v. BELL.

be paid. So as the Decree consisteth upon four points; first, were the accustomed rent was reserved: secondly where the rent was increased, there the tithes should be paid according to the whole rent: thirdly, where lesser rent was reserved, and fourthly where no rent was reserved, but had been formerly reserved, and this Act and Decree were very beneficial to the Clergy of *London*, in respect of that which they had before; and the Defendant in his Libel confesseth that the accustomed rent was reserved, and therefore no cause of suit. 2nd. It was resolved that as to such houses as were never letten to farm but inhabited by the owner, this is *casus omissus*, and shall pay no tithes by force of the Decree. 3rd. It was resolved that where the Decree saith. "Where no rent is reserved by reason of any fine or income paid beforehand". Albeit no fine or income be paid in that case, yet if no rent be reserved, the parson shall have his Tithes, according to the Decree for that is put; but for an example or cause why no rent is reserved, and whether any fine or income were paid or no, is not material as to the Parson. 4th. It was resolved that the Parson could not sue for the said Tithes in the Ecclesiastical Court, for that the Act, and that Decree raised and gave these kind of Tithes, did limit and appoint how and before whom the same should be sued for, and did appoint new and special Judges to hear and determine the same: and in the end it was awarded that the prohibition should stand.

1613.

M. 11 JA. A. D. 1613. C. B.

Dr. GRANT'S CASE.

Gwillim 259.—11 *Co.* 16 11 *Rep.*

THE case was, that *Gabriel Grant*, Doctor in Divinity, Parson of the Parish of *St. Leonard in Foster Lane, infra præcinctum Sancti Martini le Grand*, libelled in the Spiritual Court before *Dr. Master*, official of the Dean and Chapter of *Westminster*, against *Edward Taylor*, Farmer of a great and ancient House called the *Deans House*, within the precinct of *St. Martins le Grand*, late parcel of the possessions of the Abbot of *Westminster*; and alleged that every Parishioner or Inhabitant hav^s. or occupying a Mansion House, Shops, Warehouses, Cellars or Stables within the said Parish of *St. Leonard*, within *St. Martins Le Grand* yearly, every quarter of the year at the Feasts of *Easter*, the Nativity of *St. John* the Baptist, *St. Michael* the Archangel, and the birth of *Christ a tempore cujus &c.* or at least from the foundation, donation and erection of the s^d. Rectory of *St. Leonard* by equal portions to the Parsons of the said Rectory for the time being, *nomine et loco decimar' suar,' jaxta ratam cujuslibet viginti solidat' redditas per au, ex quilabet hujus modi domo, shopa, Sollar'. Cellar', sive Stabulo sic tuit' sive occupat in prædicta parochia, duas solidos legalis monetæ angliæ &c.* and that the said *Edwd. Taylor* this Family did dwell in the said House 3 years and had possessed it for the same time, *sub annuali redditu sexdecim librarum seu saltem* 12 *librarum &c.* and so demanded 2 Shillings in the pound &c. The said *Edward*

1613.

GRANT v TAYLOR.

ward Taylor exhibited an information and suggestion to the Court, that the late Abbot of *Westminster* and all his predecessors till the dissolution of the said Monastry, which was *anno* 30 *H* 8 had held the said House discharged of Tithes, and alleged the Statute of 31 *H in* 8 concerning the discharge of payment of Tithes, and conveyed to himself a Lease for years, and thereupon had a prohibition to which the said Doctor *Grant* appeared, and *Taylor* declared against him to the effect aforesaid, and *Dr. Grant* traversed the said prescription of discharge of Tythes, whereupon issue was joined and tried before me in London for Doctor *Grant:* and now it was moved by *Taylor's* Counsel that upon the said libel no consultation ought to be granted; for *de communi jure* no Tithes ought to be paid for Houses of Habitation, nor for any Rent reserved upon any Lease made of them, for Tithes ought to be paid of things which grow and renew from year to year, by the act of God *Vide Regist* 54 6, *F N B.* 53, *E. Br. Tit. Desims.* 16. and not for Dwelling Houses or of Rents issuing out of Land, reserved and created only and merely by the act of the Party, and therefore in the City of London, the Parsons have two shillings and eight pence in the Pound, &c. in name of Tithes, but that is by decree made *anno* 1535 which is enacted and confirmed by authority of Parliament, an. 37 *H.* 8 c 12: But St. *Martin's-le-Grand*, is not included within the said decree and act, for it is within *London*, and not of it and therefore remains at the common law. And in 30 *E.* 3 *fol.* 1 a and 38 *E.* 3 *fol.* 13 a by *Finchden* it is said that the profits of the Church in *London*, are the oblations and obventions.

But it was resolved *per totan cursain*, that a consultation should be granted, for it may have a lawful begining; for it may be, that for all Tithes of the Land upon

1613.
GRANT
v
TAYLOR.

upon which the houses are built, this *modus decimandi* has been a *tempore cujus*, &c. paid; and altho' it is after built that shall not take away the right of the Parson in such case. And because it may have a lawful beginning, and that it has been used *a tempore cujus*, &c. it was therefore resolved that consultation should be granted.

It was likewise resolved, that for these modusses he might sue in the Ecclesiastical Court, because they are in the nature of Tithes, (viz.) *Modi decimandi* and every ancient City and Borough has for the most part such custom, *de modo decimando* for their houses, for the maintenance of their Parson, and as to the opinions in 30 *E.* 3 and 38 *E.* 3 it was said, that *obventio decitur ab obventio* and includes oblation rents, or other revenues, which may well agree with the resolution before; and afterwards consultation was granted.

TRINITY TERM 12. JA. A. D. 1614 B. R.

1614.

WHITAKER AND TITTERSDALE
v
Dr. LEYFIELD.

Gwillim 261.

Qy. Whether a prescription to have so much for every 20s. rent for houses in the neighbourhood of London be good.

DR *Leyfield* being the parson of St. *Clements* parish and Surrogate of *Middesex*, libelled before himself for the tithes of certain stables within his parish, and stated that by prescription he and his predecessors time whereof &c. had used to have 2*s.* in every 20*s.* rent

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WHITAKER AND TITTERSDALE.

v.

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rent paid for the houses, and cited the Defendants to answer upon their oath what rent they pay.

Montague Serjt. moved for a prohibition, 1st. because the Doctor libelled before himself, so that he is both party and Judge, which is unreasonable. 2dly. because the Defendants are to answer upon oath what tithes they pay which is against the Law, for *nemo tenetur prodere seipsum.* 3dly. because the Doctor demands tithes of houses, whereas no tithes are payable by law for houses except in *London*, under the Statutes of 27 H. 8. C. 12. and these Stables are in *Middlesex*, out of *London*, and so out of the Statutes and decree.

The court inclined to grant a prohibition, for as to the first cause it is a rule in law, *nemo debet esse judex in propriâ causâ*, and they said that if the Ecclesiastical Judge sit as Judge where by law he ought not, the sentence he pronounces is void, and the judgment may be arrested.—As to the second they said that the Statute of 2 and 3 E. 6. C. 13. (*a*) gives power to the ordinary of the Diocese where the party liable to pay the Tithes inhabits, to call the party before him, and at his discretion to examine him by all lawful and reasonable means, other than by his own corporal oath concerning the true payment of personal Tithes, and the Statute of 35 H. 8 C. 19. goes also in confirmation of this.—But it seemed to *Coke*, Chief Justice, that the motion for a prohibition ought to be made before the oath is taken, for if the oath is once taken, it is too late, because it is then done and past. As to the third cause, *Coke*, Chief Justice seemed to incline that no prohibition ought to be granted, for the prescription appeared to him to be reasonable enough, because it was probable that where these

(*a*) This Statute does not extend to the City of London.

Stables

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WHITAKER AND TITTERSDALE. v Dr. LEYFIELD.

Stables now stood, there was formerly Garden or Orchard Ground, for which a Tithe-rent was paid, and it would be unreasonable that the parson should be defeated of his Tithes by the building of houses upon such ground, and therefore in Dr. *Grant's* case it was adjudged, where Dr. *Grant* libelled in the Spiritual Court for the Tithe-rent of houses in St. *Martins* out of *London*, (viz) 2*s.* in every 20*s.* rent that was paid, and a prohibition was granted upon a suggestion that all the houses were in the hand of the prior of *Westminster*, discharged of the payment of Tithes at the time of the dissolution by prescription; that a consultation should be awarded upon the prescription found for the Plaintiff, (notwithstanding it was moved that a consultation ought not to be granted, because no tithe is payable for houses that are out of *London*) for *non constat curiæ* when these houses were built, and it might be that this *modus dicimandi* was paid for the Land before the houses were built, which *modus* is suable for in the Spiritual Court, and it is unreasonble that the *modus* should be discharged by the building of the houses. And as to the Book of 31. E. 3. which saith that no tithes are to be paid in *London* except only offerings and obventions; he said that this does not extend so far, as that a tithe-rent may not be well paid in *London*, because *obventus* includes every manner of profit; and a day being given till the next term for the granting of the prohibition, the Plaintiff's in the mean time moved the Court of Common Pleas for a prohibition when it was granted to them.

The

1614.

The History of the foregoing Case is thus reported in Hob: Rep. p. 10.

DOCTOR LEIFEILD *v.* TYSDALE.

DR *Leifeild* parson of St. *Clements* without Temple-bar, sued one *Tysdale* his parishioner for tithes of certain stables and libelled that of common right and by prescription time out of mind, the parsons there used to have a *modus dicimandi* for the houses, stables, and buildings that is to say, after the rate of the tenth part of the yearly rent or value of the same, and so he proceeds to demand accordingly, whereupon a prohibition was desired and the opinion of the Court was that a prohibition was to be granted; for *de comuni jure* no tithes are to be paid for the yearly rent or value of houses; for tithes are paid for the revenue and increase of things and therefore no tithes are paid in any such case in any Cities or Towns in *England*, saving in *London*, and this Parish is out of *London* and the liberties thereof. Now where there is no tithe at all *de comuni juri*, there can never be a *modus decimandi* for that is with an abatement, correction or alteration of the tithe in specie. And yet it seems that this kind of payment had been long used here about *London*, which certainly was by use, for when the statute gave it in *London*, the parts adjoining gained the same by that colour, and even in *London* it must be sued for according to the form prescribed by the statue. But for houses, oblations were paid in all places, and now by the statute, were brought to a certainty that is a groat for a house.

And

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LEIFEILD v TYSDALE.

And in *Mich.* 12 *Ja.* the case was moved again by *Harris*, for the Doctor, who said that by a special custom, such a form of tithing would stand in any place and said that Dr *Grant* had a consultation in this Court upon argument in the very same case for two shillings in the pound in *St. Martin's-le-Grand*, which was not within the statute, (*a*) for it is a liberty exempted from *London* and is no part of *London*, nor of the liberties of *London*, and the reason was because it may be supposed that such form of tithing was used for the land itself before it was built upon, and then the building cannot take it away, and therefore it is now directed by the court, that they shall declare upon the prohibition and then proceed to judgment.

1617.

M. 15 JA. A.D. 1617. IN CHANCERY

DUNN *v.* BURRELL and GOFFE.

(*MSS. Calthorp—Gwillim*, 299.)

The ancient rent was reserved upon a house in London and also a further sum by way of fine and income:

THIS case which was argued by Sir *Francis Moore*, Serjeant at Law, and *Walters*, of the Temple, before Sir *Francis Bacon*, Lord Keeper, assisted by the Chief Justices *Montague* and *Robart*, and the Justices *Dodderidge* and *Hutton*, was as follows:

Burrell being seised in his Demesne as a fee of a House called *Queen Acre*, and a Shop and Warehouse

Qy. Whether tithes are payable under the Decree of 37 *Hen.* 8. according to the ancient rent and the sum reserved by way of fine and income? See an abstract of the arguments in this case in *Calthorpes Customs of London*, 93.

(*a*) ante 38.

in

1617.

DUNN v. BURRELL and GOFFE.

in the Parish of *Gracechurch* in *London*, for which a Rent of £5. *per Ann.* had been usually paid in the 3rd *James*, made a Lease by Indenture, for 5 Years, of part of the House and of the Shop, at the Rent of £5. *per Annum*, payable at the four usual Feasts, by equal portions; and in that Indenture of Lease it was covenanted and agreed, that *Withers*, the Lessee, should pay £150. in the name of a fine and Income, which was distributed with several payments of £30. each, to be made at the same Feasts at which the rent of the £5. was reserved to be paid. The Term expires, *Burrell* afterwards in 10 *Ja.* made a Lease for seven Years by Indenture, to one *Goffe*, of the said part of the House and of the Warehouse, under the Rent of £5. *per Annum*, payable by equal portions at the Feasts of *St. Michael*, the Archangel, and the *Annunciation*, and in the same Indenture it was covenanted and agreed that £175. should be paid to *Burrell*, his Heirs, Executors and Assigns, in the name of a fine and Income, by several payments of £25. *per Annum*, to be made at the same feasts at which the reserved Rent was to be paid by equal portions, that is £12. 10*s*. at one feast, and £12. 10*s*. at the other feast. *Dunn*, Parson of the Church of *Gracechurch*, preferred a Petition to the Mayor of *London*, stating that *Burrell* and *Goffe*, did not pay him their Tithes according to the rate of the fine that had been so reserved: And Sentence being pronounced against him, he upon the Decree established by the Statute of 27 *Hen.* 8. c. 12. which enacts, "that if any of the said parties find them-"selves aggrieved with the end made by the *Mayor* "and his assistants, that then the *Lord Chancellor* of "*England*, for the time being, upon complaint to him "made within three Months next following, shall make "an end in the same with such Costs to be awarded as "shall be thought convenient, &c." exhibited his Bill

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his Bill of Appeal to the *Lord Keeper*, in which he set forth the whole matter, Supra and the Statute of 27 *H.* 8. c. 12. and directed that part of the decree which wills, "that the Citizens and Inhabitants of the "said City and Liberties of the same, for the time "being, shall yearly without fraud or covin, for ever "pay their TITHES to the Parsons, Vicars, and Cu- "rates of the City and their Successors for the time "being, after the rate hereafter following, that is to "wit: of every 10*s.* Rent by the Year, of all and every "House and Houses, Shops, Warehouses, Cellars, and "Stables, within the said City and Liberty of the "same 1*s.* 4*d.*; and of every 20*s.* Rent by the Year, "of all and every such House and Houses, Shops, "Warehouses, Cellars, and Stables, and every of them "within the said City and Liberties, 2*s.* 9*d.*, and so "above the Rent of 20*s.* by the Year, ascending from "10*s.* to 20*s.* according to the rate aforesaid, and "where any Lease is or shall be made of any Dwelling "House or Houses, Shops, Warehouses, Cellars, or "Stables, or any of them by fraud or covin, reserving "less Rent then hath been accustomed or is, or that "any such Lease shall be made without any Rent "reserved upon the same by reason of any fine or in- "come paid before hand, or by any fraud or covin "that then in every such case the Tenant or Farmer, "Tenants or Farmers thereof, shall pay for his or "their TYTHES of the same after the rate aforesaid, "according to the quantity of such Rent or Rents as "the same House or Houses, Shops, Warehouses, "Cellars, or Stables, or any of them were last letten "for, without fraud or covin before the making such "Lease.

To this Bill of Appeal the Defendants put in their Answer in which they set forth that there never was any

any greater Rent reserved than £5. *per Annum*, and that they were to pay according to that rate, and they traversed the fraud and covin. To this Answer *Dunn* the Complainant, demurred. *Moore* Serjeant, argued for the Complainant. I conceive that the decree of the Mayor is erroneous in two points—1st in not adjudging the reservation of £5. *per Annum*, by way of fine and Income to be a fraudulent reservation to avoid the Statute of 37 *H.* 8, c. 12. and 2dly, in not adjudging *Burrell* to pay according to the £25. *per Ann.* which he had so reserved by way of income. The case divides itself into two points. The *first* is whether this reservation of £25. *per Ann.* by way of fine and income be a fraud and covin within the decree, so that in determining the rate at which the Tithes shall be paid respect shall be had to it, and this is upon the body of the decree. The *second point* is upon the additional clause of the decree which wills that if any Lease shall be made reserving a less Rent or no Rent, &c. and it is whether respect shall be had to what was reserved by way of fine and Income in the Lease to *Withers*.

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As to (*a*) the *first point* it is evident by Dr. *Grant's* case, that Houses may by custom well enough be charged with the payment of Tithes for Houses and Shops being things in which Persons exercise their Trades and gain their livelihood, it is but reasonable that there should be a contribution to the Minister out of them, as well as out of Lands. In the case of *Green* v. *Piper*, in the King's Bench in the 34 of *Eliz.* (*b*) where a prohibition had been granted upon a suggestion that a House in *London*, was part of the possessions of an Abbey, which was discharged of the payment of Tithes by virtue of a papal Bull, at the time of passing the

(*a*) ante. 38. (*b*) ante 34.

Statute

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Statute of 31 *H.* 8, c. 13, of Monastries; a consultation was afterwards awarded, because the Statute of 37 *H.* 8, c. 12, was subsequent to the Statute of 31 *H.* 8, and by that Statute no Houses in *London*, were exempt but the Houses of Noblemen, this being so then, that Houses by a reasonable custom may be charged with the payment of Tithes, it now remains to examine the fraud in the case at Bar; for the better discussion of which I would proceed by *three* gradations, the *first* of which shall be to show what eye the Common Law had to fraud without the aid of any Statute; the *next* shall be to shew what consideration the Law had to encounter fraud for the evasion of any Statutes in which there was not any express provision made against fraud; and the *third* shall be to shew the beneficial exposition of these Statutes which have made provision in express words against fraud. As to the *first* point it appears by 34 *E.* 1, *Garrante*, 88; 19 *E.* 2, *Assets*, 3; 13 *Eliz.* Dy, 291, that where Tenant in tail after a feofment with Warrantry of his Lands in fee simple to his Son and Heir, in order to avoid a descent of Assets, it was adjudged to be a fraud at Common Law, so as not to prevent the descent of the Assets; and the 24 *E.* 3, 4, & 5, *Ma Dy*, 160, where one indebted to the King had fraudulently with the King's money, purchased Lands in the Names of his Friends, those Lands were sold or liable to the payment of his Debts. In *Fitzherbert's* case, 5 *Rep.* 79, b, a collateral Warranty was recorded and adjudged to be a Warranty commencing by dissecssin by reason of fraud, and in 1 *Ma. Dy* 99, b. A Sale in a fair did not change the Property of a Horse where the Contract was made out of the fair. As to the *second point* when any Person would by a device evade a Statute which has no express provision in it against fraud, the Common Law will throw in its aid and protection;

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and to that purpose upon the Statute of *Gloucester*, c. 11, which gives remedy to the termor upon default of the reversioner, it was holden that if the Tenant vouch, and the vouchee make default, it is within the equity of the Statute, for such slight shall not protect the fraud; and in *Elmer's Case*, 5 *Rep.* 2, a surrender upon condition shall not be taken to be a Surrender within the 13 of *Eliz.* And in 5 *Rep.* 14, *the Case of Ecclesiastical Persons*, it is holden that the losing by Action tried in a Writ of Annuity after aid prier of the Patron and Ordinary is fraud within the Statute of 13 *Eliz*: And in 11 *Rep.* 66 b. *Magdalen College Case*, the permitting of a fine to be levied by the desseisor, and five Years to pass is within the Statute of 13 *Eliz.* which speakes of Conusees. And 43 *Eliz.* in the case of *Pawlet* and *Fry*, it was ruled by *Popham* and *Anderson*, that where a *Dean* and *Chapter* borrowed £1000. which came to the use of the *Dean* and *Chapter*, for the payment of their Debts, and bound themselves in the Penalty of £2000. for the payment of £1000 at a certain Day, and afterwards a judgment was had upon this obligation upon which a defeazance was made that if the *Dean* and *Chapter* after the expiration of fifteen Years, should make a Lease to *Fry*, agreeably to the first contract, that then, &c.; this judgment was avoided by the Statute of 14 *Eliz.* which makes all Covenants and Bonds void, it being merely a fraud to evade the Statute, which shall not be permitted. As to the *third point* which is the beneficial exposition of the Statutes that have made an express provision against fraud, it is ruled by 21 *E.* 3, 28. that a Release to an Abbot of a Rent is Mortmain notwithstanding the Statute of *Magna Charta*, c. 36, wills *quod non liceat alicui dare*, and this cannot be said to be a donation.

So upon the Statute of 7 *E.* 1, *de religiosis*, which

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prohibits alienations to religious Persons, *arte vel ingenio*, it hath been adjudged that a Recovery by default without Title is Mortmain, as appears by the Statute of *West* 2, c. 32. So in 48 *E.* 3, 29 &. 38, where a Recovery has been upon the default of the Vouchee, it hath been adjudged within the Statute So. 3, *E.* 4, 14, An Estate gained by way of estoppel upon *nul waste* pleaded hath been adjudged within the Statute. So a Case in 14 *Ja. Rot.* 1026 in the Common Pleas between *Winchcombe* and *Pulleston*, upon the Statute of 31 *Eliz.* c. 6, which prohibits a presentation for Money to a benefice with cure either directly or indirectly, it was ruled that where *Say* for £00, contracted with *Waller* to present him to a Church after the death of an Incumbent, who then lay *in extremis*, and to that intent procured the next avoidance to be granted to one *Elder*, who after the death of the Incumbent presented *Say*, without taking any Money or Reward; that this was Simony notwithstanding the person when presented, received no Money because the grant of the next avoidance was part and derived out of the first contract, which was clearly simoniacal and merely a trick to defraud the Statute, and notwithstanding in 3 *Eliz. Dy.* 193 and 10 *Eliz. Dy.* 267, it was ruled that a feoffment to the intent to defraud Creditors, shall not be construed to be a fraud to deceive the King because it was not made with that intent, yet upon the first clause in the Statute of 27 *El.* c. 4, which mentions fraudulent conveyances made to defraud purchasers it is ruled in *Burrell's Case*, 6 *Rep.* 72, that where a Lease was assigned in order to avoid an extinguishment, it was fraud within that Statute; and upon the second clause of the Statute which speaks of Estates made with power of revocation, it is ruled in *Bullock* and *Standen's* Case 3 *Rep.* 82, b. that a power of future revocation after the death of another, or a power of revocation with the

the assent of others, shall be deemed a fraudulent conveyance within that clause of the Statute. In the case at bar then which is a case that affects religion, which is a case that concerns our God a favourable construction shall be made that this slight of a reservation of Rent by way of fine, and a sum in gross shall not defeat the Parson of that which is justly due to him.

As to the *2nd point*, which is upon the additional clause of the Statute made to meet future fraud; it consists of two mischiefs and one reason. The first mischief is where a Lease is made of a House, and there is a reservation of less than the accustomed Rent. The second mischief is where there is no reservation of any Rent at all, and here we are within one of the mischiefs, for, whereas under *Withers* Lease there was a reservation of £35 *per annum*, here there is a reservation of only £30 *per annum*, and so there is fraud and covin as has been proved above. And there is not any fine or income paid before-hand as the Statute mentions; but it is future if any be which shews the fraud more apparently, and if a greater Rent, than the ancient Rent be reserved, it is out of both of the mischiefs of the additional clause, so, that I conceive, if a Lease of a house in *London* be made *bonâfide* for natural affection to the Son of the Lessor, without reserving any Rent; the Parson will lose his TITHES for it is out of the additional clause. The non-reservation of any Rent, being in respect of the advancement of the Son, and not in respect of any Income paid, or by reason of fraud and covin. But if the Lease be made only in trust for the Lessor, then it will be within the additional clause, for the Trust shall be said to be fraud and covin, and so it will be within the Penalty of the Statute, which says, that the Parishioner shall pay his Tithes according to the rate of ancient reservation, wherefore in the case at

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bar, *Goff and Burrell*, must pay their Tithes according to the reservation under *Withers* Lease, which shall be said to be made by fraud and covin, as well as the reservation under the Lease to *Goff*. And the last clause which gives the Penalty that the Parson shall have, at the rate of the ancient reservation, does not take away the benefit of the 1st clause which gives him the Tithes, according to the rate of 2s. 6d. for every 20s. Rent. So upon the Statute of *West*, 2 c 3, where the one clause gives to a feme a *cui in vitâ* if the other clause gives to her a receipt for the default of her Baron, it hath been adjudged in 38. *E* 3. 12. that if a fine being received for the default of her Baron make default, whereby a recovery is had against her, yet after the Death of her Baron, she may well have a *cui ni vitâ* for the latter clause does not take away the benefit given to her by the former. So upon the Statute of 27. *El* c. 2. which has one clause, as to conveyances made with intent to defraud Purchasers, and another as to conveyances made with a power of reservation, it hath been adjudged in the case of *Standen and Bullock*, cited in *Twine's Case*, 3 *Rep* 86 that a *bonâfide* Purchaser shall have the Land, where the power of revocation has been extinguished by fine or any other such instrument, for the latter clause respecting a power of revocation, does not deprive the Purchaser of the benefit of the former clause.

As to the objection, that this which is reserved by way of fine or income, is a Sum in gross, and not a rent, because it is not incident to the reversion: I answer that it has the properties and qualities of a rent, for the fine is reserved in the same Deed and at the same time with the Rent, it is made payable at the same time with the Rent, and the same means may be taken for the recovery of it, for the Lessor may either distrain for it, or have an

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an action of Covenant. This being so, it is at least as a rent in reputation, though it be not a rent *re verâ* and if it be a rent in reputation, that will be sufficient, within the Statute of 37 *H* 8 c 12 as a Chantry in reputation, shall be said to be a Chantry, within the Statute of *Chantries* as we see in *Adams* and *Lamberts* case, in 4 *Rep* 104 and in 5 *Rep* 3. *Jewels* case, where there was a rent reserved upon the Lease of a fair, it was said to be a rent in reputation, and that an action of Debt lie upon the Contract.—

Waller contra—the case he said was briefly this—*Burrell* being seised of a House which from time immemorial had been let for £5 *per annum*, makes a Lease of part of it, reserving the rent of £5 *per annum*, with a covenant also for the payment of £175, in the name of a fine and income, to be paid in several sums of £25 *per annum* during the term. (that is) £12 10s. at the one feast-day, in the year wherein the rent was made payable, and £12 10s. on the other feast-day; and I insist that the Parson is only to have his Tithes, after the rate of £5 *per annum*, and not after the rate of £30 *per annum*. To support this, I will shew in the first place, that Tithes were not due for Houses by the common law of the land, and before the making of any statute to that purpose. 2dly, I will shew that the constitutions and ordinances of the Pope, cannot make Tithes payable for those things which are discharged of common right. Thirdly, I will shew, that an act of Common Council in *London* cannot lay the imposition of Tithes upon Houses, discharged by the common Law of the Land. 4*thly*, I will shew that the words of the Decree and Act of 37 *H* 8 c 12, do not extend to the fine and income in the case at bar. 5*thly*. I will shew, that by the equity and intent of the Statute, Tithes are not to be paid according to the rate of the fine and income.

As to the 1st of common right and by the common law

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law of the land, Tithes are not due nor are they payable of any thing but what yields an increase, and a renewing profit, and not of those things which neither increase nor renew; but rather decrease, of which nature are Houses, which require repairs, therefore, it is said in FNB 53 E. that Tithes shall not be, but of such things as increase from year to year, by the manure of Man. 2d. Houses being of the Inheritance, and the rent received being of the same nature, Tithes are not payable of them; for by the rule in Law, Tithes are not to be paid of any part of the Inheritance, but only of those things which renew, and it is for that reason that Tithes are not payable of Coals, Slates, &c. for they are part of the Inheritance, and not renewing. 3d. Houses being things necessary for habitation, and contributing to the benefit of the Parson in another way, Tithes are not to be paid for them; and, upon this principle it was adjudged in the King's Bench, in 31 *Eliz.* that Tithes are not payable for the agistment of Draught Oxen, because they are used in the cultivation of the Land, and tend to the benefit of the Parson, in another way; and in *Broughton's* case in the King's Bench, in 32 and 33 *Eliz.*, it was ruled, that Tithes are not payable for the agistment of Draught Oxen, or a Riding Gelding, because they yield and increase in another way, and are things of necessity and of help. In the case at bar then, Houses are things of necessity, for the rest and habitation of Man, and for protection against the weather, and not giving any increase (for there is neither grass nor corn raised in them.) Tithes ought not to be paid for them. And *Finchden* 38 *E 3.* says, that the only Tithes in *London* are oblations and obventions, called rate Tithes; and that there are no others. And as custom may discharge a spiritual person from the payment of Tithes, I do not deny but custom may create a rate Tithe, and charge those things

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things with the payment of Tithe, which of themselves are discharged in Law, as is agreed in Dr. *Grant's* case, (*a*) and accordingly we see in the decree of the Statute of 37 *H.* 8. that the Houses of Noblemen are discharged of rate Tithes. In the case of *Dawson* and *Green* in the King's Bench, in 34. *Eliz.* and in Dr. *Leyfields* case, in the common pleas, in Tr. Term. 12. *Jn.* (*b*) it was adjudged, that Houses were at common Law discharged of the payment of Tithes.

As to the *second point*, respecting the validity of the ordinances and constitutions of the Pope; I submit, that an ordinance of the Pope cannot bind my temporal Inheritance, and therefore, where there was an ordinance of the Pope, for the payment of 2s. 6d. in every pound of Rent received in *London*, it was of no validity for the Pope, though he had power to dispense with any act done against the lands of the Church, as we find by 2. *H.* 4. yet he had no power to alter the law and to charge my Inheritance; and therefore, though he might dispense with the holding of several benefices, and though he might by his dispensation empower one to hold a Church *in commendam*, notwithstanding his entry into Religion, (for these are merely dispensations with the Canons of the Church,) yet he could not alter the law of the Land, and change the Inheritance of any man—It hath been thereupon adjudged, that a provision made by the Pope, is void in law against the Patron, inasmuch as it is an impoverishment of his Inheritance. So a Licence by the Pope to a Monk, to hold a temporal inheritance, is void in Law, according to 3. *H.* 6. for the entry into Religion, being a civil Death, the Monk cannot by the common Law have the Land afterwards. So in 1. *H.* 7. it is agreed, that the Pope cannot make a Sanctuary, though he may consecrate *it* after it is made by the King. So in *Grendons* case it is holden, that the

(*a*) Ante, 38. (*b*) Ante, 40.

Pope

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Pope cannot make any appropriation, any more than he can make a union, according to 11. *H.* 7. for it concern a temporal inheritance.

As to the *third point*, namely, the power of the Common Council in *London*: though an act of Common Council, may bind men in point of order and Government, yet it has not power to bind them in point of their inheritance. The act, therefore, of the Common Council which, together with the Constitution of the Pope imposed upon every Inhabitant of London, who paid 10s. rent, an offering of a farthing on the vigil of every Feast Day, which were 85 in number, was not binding; for as it appears in 5. *Rep.* in the *Case of Bye Laws*, though the Tenants of a Manor may make a Bye Law, that a Commoner shall not turn his Beasts upon the Common until such a Day, yet they cannot make a Bye Law to exclude a Commoner from his Common, because that concerns his temporal Inheritance, which cannot be bound by such a Bye Law.

As to the *fourth point*, the body of the act being for the payment of 16d. for every 10s. Rent; the Letter of the act extends only to the case of a Rent, so that if there be no rent, then the body of the act will not extend to it, and the fine of £25. which is to be paid annually, over and above the £5. is not a Rent. 1st. because it does not issue out of the Land. 2ly. because there can be no distress for it of common right, as for a rent. 4thly. it is not incident to the reversion. 5thly. it will not descend to the Heir as a Rent will, as in a case of 10. *Eliz. Dy* where a covenant was to pay a Sum in Gross to another and his Heirs, it was holden that it could not descend. 6thly if part of the Reversion is granted away, there will be no division or appointment of it, as there would be of a rent. 7thly, an entry of the Lessor into part of the House, will not cause

cause a suspension of it, as it would of Rent, According to the resolution in *Albany's Case*, in 33 *Eliz.* where there was a proviso to pay such a Sum as in the present case annually, and it was holden, that entry into part did not suspend the condition, it being then no rent. The Letter of the Decree of 37 *H.* 8. will not extend to it; and if it be not within the Letter of the Decree, neither will it be within the equity of it. First it is a Penal Law, and therefore shall not be extended by equity. 2dly, the body of the Act directs, that there shall be a payment without any fraud and covin, so that the body of the Act only makes it to be a fraud and covin, where the payment is not according to the quantity of the Rent, and the fraud and covin, if there be any, will not make that to be rent; which the Law says is not Rent: and to talk of fraud against the Common Law and against the Statute, is not to the purpose, since the whole question arises merely upon the act which creates the payment of Tithes, where, in the eye of the Common Law none were before payable.

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As to the cases which have been cited on the other side against Frauds at Common Law; they do not meet the case in question, in asmuch as in those cases the Fraud was committed in prejudice of a Person who had an interest in being at the time it was committed; as in *Fitzherbert's* case 5 *Rep.* 78. the Person who was to be bound by the collateral, warranty, had an interest in being at the time. So in 24 *E.* 3 10 the King had a Debt in being at the time and in 34 *E.* 1 *Garrante* 88 the feoffee of the Lands, had an interest in being at the time of the feoffment of the Lands in fee simple. But in the case at bar at the time of making the Lease and committing the fraud, there was no interest in being in a greater rent than the rent of £5 *per annum*, for no one

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one could claim the Tithes for a greater rent than £5. If then that be so, the fraud cannot extend to it, as it might do to an interest in being; and as to the case in 34 E. 1 *Garrante* 88 if the feoffment to the son in fee simple of the Lands, had been prior to the feoffment of the Lands in tail, there would not have been any fraud at the Common Law, because the feoffee of the Lands would not have interest therein, at the time of the feoffment to the son. So in the case at bar, because there was only a rent of £5 *per annum* in esse at the time of the fraud committed, (admitting that there was any fraud at all) the Common Law can give no aid, neither can the statute of 37 *H.* 8. for if any aid were given it must be either upon the body of the decree, or upon the additional clause of the decree, and as to the body of the decree which says that the Citizens and Inhabitants, &c. shall without covin pay for every 10s. rent by the year 16*d* it does not give any aid for the payment of more than after the rate of £5 *per annum*, because there is no more rent reserved; for the other £25 *per annum* reserved is not a rent as I have shown already. And as to the additional clause in the decree which directs that if by fraud or covin, any less rent than the accustomed rent, or no rent shall be reserved that will not aid, for here is the rent of £5 per annum reserved, which is the ancient and accustomed rent, and so it is out of the provision of the additional clause of the act.

And as to the *5th. point*, namely that the equity and intent of the act will not extend to the fine of £25, it appears by the additional clause that it only points to the ancient and accustomed rent, and not to any new advancement of the rent for 1st. there is not one word of any increase of rent throughout the whole decree. 2dly the clause which says that if a Lease shall be

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be made of any house, &c. by fraud or covin reserving less rent than the accustomed rent, shews that it was not the intent of the statute to meddle where there was any greater rent reserved, than the ancient and accustomed rent. 3dly the penalty expressed in the act where a less rent than the accustomed rent, or no rent at all is reserved, shews that the act looks only to the reservation of the ancient rent, for the penalty where a less or no rent is reserved, is only that the Tenant or Farmer shall pay for his Tithes of the same according to the quality of such rent or rents, as the same houses heretofore have letten for, without fraud or covin, before the making of such lease; and to extend the penalty beyond what it is expressed in the act, is quite an unusual thing. For if a Law introduces a new thing which was not before, and expresses a fraud and covin, and inflicts a penalty, in such case by construction, another thing, than what is plainly expressed in the act, shall not be said to be a fraud within it, nor shall there be any further penalty added beyond what the statutes inflicts. And therefore in the case at bar, since the ancient rent of £5 is reserved, and according to that rate, Tithes are to be paid to the Parson of the Parish; the reservation of the fine of £25 to be paid annually, shall not be said to be a fraud within the statute, and Tithes shall not be paid according to the rate of that fine. And if in *Myghts case* in 8 *Rep.* 163 it be resolved that if Tenant *in capite* make a feoffment in fee, to his son or wife of two parts of his Land; an averment shall not be taken that it was fraud to cheat the King, because the statute enables him to dispose of two parts; by the same reason, as the ancient rent of £5 is reserved in the case at bar, an averment shall not be permitted that the reservation of the £25 was by fraud and covin, because the statutes requires no more at the hands of the Lessor

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Lessor than the reservation of the accustomed rent. And as it is resolved in *Myghts case* that if the Father and Son be joint purchasers to them and their Heirs of Lands holden *in Capite*, an averment shall not be permitted that this joint purchase was by fraud to deceive the King, because the King's title was not in being at the time of the purchase. So by the same reason this increase by way of fine, being *de novo* and not *in esse* before, shall not be averred to be by fraud to cheat the Parson, more especially so, because this reservation of £25 *per annum*, by way of fine and income may be founded upon good reason, for it may be, that the Lessor is Tenant in tail of his house, and so if he were to make a lease reserving the rent of £20 *per annum*, it would be of this prejudice to him, that he could not afterwards grant a lease reserving a less rent, which might be exceedingly hurtful to him and therefore he reserves the £25 *per annum*, by way of fine and income. Besides in London, men live by trading and merchandizing, and they must of necessity take houses, shops and warehouses; and if young men were to pay the whole fine, in one entire sum, it might be a great hindrance, for which reason, in a lease of such premises, they use to take it by way of annual payment, like a rent. As to the objection that lands in the country are improved, and so, consequently, are the Parsons tithes, and therefore it is reasonable that the Tithes of houses in *London*, should have a like increase; I answer 1st that the tithes of houses in *London*, are only a rate tithe, and where there is a *modus dicimandi*, for lands in the country there is not any increase, 2dly as lands improve, so there is an increase of houses in London, which yield a benefit to the minister, 3dly lands yield an increase of their own nature, but houses do not, but require a great charge to maintain them; so that there is no

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reason that the Tithes of houses should increase as those of Land do. And the Statute of 2 *E.* 6 discharges barren land which require great expence for their manurance from the payment of Tithes for 7 years In the case of *Skidmore and Bell* in the Common Pleas, *Mich.* 5 *Ja.* (*a*) it was adjudged, that there could not be fraud averred for the sum that was reserved by way of fine, for it being a rent only in imagination, and the ancient rent being reserved, it shall never be taken that it was the intent of the Satute to extend to it, but if there had been no rent at all reserved, in respect of the sum in gross to be paid in future, or if there had been a reservation of a greater rent only for one year, in either of those cases the additional clauses of the Statute would give relief.

The Lord Keeper said, that the question rests merely on the body of the Act, and that there is no colour to bring the reservation in this case within the clause, which speaks of the reservation of no rent, or of a less rent, but the only question is whether this imitative rent, be a rent within the body of the Act. He said farther that there is no question but that the Statute extends to the case where a greater rent than the ancient rent is reserved, and he ordered the Counsel to take into their consideration, what authority the Lord Keeper had upon Appeal from the Mayor, and in what manner he was to proceed, *Et adjornatur.*

Afterwards in *Easter Term*, 16 *Ja.* at the request of Sir *Francis Bacon* Lord *Chancellor of England*, a Special Commission was granted to the *Archbishop of Canterbury*, the *Lord Chancellor*, the *Earl of Suffolk*, Lord Treasurer of England, the *Earl of Worcester*, Keeper of the Privy Seal, the *Earl of Pembroke* Lord

(*a*) Ante, 36.

Keeper

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Chamberlain of the Household, the *Bishop of London*, the *Bishop of Ely*, *Sir Henry Montague* Chief Justice of the King's Bench, *Sir Harry Hobart* Chief Justice of the Common Pleas, *Sir Julius Cesar* Master of the Rolls, *Dodderidge* one of the Justices of the King's Bench, and *Hatton* one of the Justices of the Common Pleas, in which there was a recital of the question depending between *Dunne* of the one part, and *Burrell* and *Goffe* of the other part, and power given to them to hear and determine that cause, and likewise to mediate between the *Ministers* of the Churches in *London*, and the *Citizens* of *London*, and to make an arbitary end between them, whereby a competent provision might be made for the Ministers, and so a heavy burthen might not be imposed upon the Citizens, and commanding them to certify to the King what they should do in the premises.

The Case therefore was argued at *York House*, by Sir *Henry Finch*, one of the King's Serjeants for the Plaintiff. Before I go (he said) into the particular Question now to be treated of, I will shew in what manner and how Tithes and Offerings ought to be paid in *London*. As to this, *Lindwood*, in his book *de Decimis*, in the chapter *Sancta Ecclesia*, in his gloss. on the word *Negotiationum*, saith, *quod artifices et negotiatores civitatis London ex ordinatione antiquâ in dictâ civitate observatâ tenentur singulis dominicis diebus et in principalibus festis sanctinum apostolorum & aliorum quorum vigilias jejunantur offerre pro singulis decem solidis redditûs domûs quam inhabitant unum quadrantem. Et ordinatio prædicta indifferenter arctat quoscunque inhabitantes, sive sunt artifices sive mercatores sive quivis alii.* This ordinance mentioned by *Lindwood*, had reference to a Constitution made by *Niger* Bishop of London, 13 *H.* 3 *A.*

3. A. D. 1228, which was confirmed in 21 R. 2. by *Thomas* then Archbishop of *Canterbury*, and afterwards by Pope *Innocent*, in 5 *H.* 4. And subsequent to that in 31 *H.* 6. Pope *Nicholas* ordained by his Bull that Tithes should be paid of Houses in *London* as above, a valuation being made of them according to the true and usual value of Houses; and the rate according to that proportion amounted to 3*s.* 5*d.* in the pound for each House, for there were 82 Vigils of Saints that were fasted, and of Sundays. In 36 *H.* 6. there was a composition made between the Citizens and Clergy of *London*, that a payment should be made by the Citizens for their Houses according to the above rate, and if the Houses were kept in the hands of the owner, or if they were leased out without reserving any rent, the Churchwardens of the Parish where the Houses were, should set down a Rate of the Houses, and according to that Rate a payment should be made. In the 14 *E.* 4. an Act of Common Council in London, passed for the confirmation of the Bull granted by Pope *Nicholas*, but there being afterwards a great variance between the Clergy and Citizens, they submitted themselves to the award of the Lord Chancellor and several other of the Privy Council, who in 1535 made an Order that every Inhabitant and Citizen should pay at the rate of 1*s.* 4*d.* for every House; and in 27 *H.* 8. there was a proclamation made for confirming that Order; and in the same Year as it appears by the Statute of 27 H. 8, c. 15, there was a Statute made to ratify the said Order, and a Proclamation issued as I have mentioned, until an order for the payment of the Tithes should be made by thirty-two persons to be nominated by his Majesty. But no such Order being thereupon made, the King making no nomination, and other disputes arising concerning the payment of Tithes and Offerings, by the Statute of 37 *H.* 8. c. 12. a submission was

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was made to *Thomas Cranmer* Archbishop of *Canterbury*, Sir *Thomas Wriothesley* Knight, Lord Chancellor of *England*, *Thomas* Duke of *Norfolk*, and several others, and it was enacted, *that such end, order, and direction, as should be made, decreed, and concluded by the aforenamed Archbishop, Lords, and Knights, or any six of them, before the feast day of March next ensuing, of, for, and concerning the payment of Tithes, oblations and other duties, within the said City and Liberties of the same, and enrolled in the King's High Court of Chancery of Record, should stand, remain, and be as an Act of Parliament, and should bind as well all Citizens and Inhabitants of the said City and Liberties for the time being as the said Parsons, Vicars, &c. according to the effect, purport, and intent of the said order and decree so to be made and enrolled.* In consequence of which an Order was afterwards made by all the Commissioners except the Duke of *Norfolk*, and Sir *Richard Lyster* Knight, Chief Justice of *England*, that the Citizens and Inhabitants of *London*, should pay at the rate of 2*s*. 9*d*. for every pound of rent that was paid for the Houses; and upon two branches in this order or decree, the present question arises. The first of these branches is that *the Citizens and Inhabitants of the said City, &c. shall Yearly without fraud or covin for ever pay their Tithes to the Parsons, &c. after the rate hereafter following, (that is to wit) of every* 10*s*. *rent by the Year*, 1*s*. 4½*d*. *and of every* 20*s*. *rent*, 2*s*. 9*d*. The second branch is, *and where any Lease is or shall be made of any Dwelling House, &c. by fraud or covin, reserving less rent than hath been accustomed or is, or that any Lease shall be made without reserving any Rent upon the same, by reason of any fine or income paid before hand, or by any fraud or covin, that then in every such case the Tenant or Farmer, &c. shall pay for his or their Tithes according to*

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the quantity of such rent or rents, &c., as the same were last letten for without fraud or covin, before the making of such Lease. The only question then in this Case will be whether there shall be 2*s.* 9*d.* in the pound paid according to the rate of £5. or according to the rate of £25 *per Annum*, which is reserved annually by way of Income. And this question, though in this particular, it is of no great moment, because it is but for a trivial sum beyond what is paid, yet in its consequence it is of very great importance so that it may not only be said that it is *magnum in parvo*, but that it is *maximum in minimo*, and the cause may be termed a maiden Cause, there having been none of this nature before; and it comes properly under the meridian of the Court of Chancery, the Chancellor being the proper Judge of it, and the person to whom it is principally referred. And I am of opinion that Judgement ought to be given for the Plaintiff, for I conceive that this rent of £25 *per Annum*, which is received by way of fine and Income, is a rent properly and truly within the words and letter of the Decree. For 1st the etymology and genuine propriety of the word *rent* shews that it is so. 2nd. It is so in common acceptation and according to the popular use of the word. 3rd. It is a rent in the Judgement and eye of the Law. 4th. It is a rent in the Understanding of the Spiritual and Ecclesiastical Law, so that being a rent all those four ways, it would be hard that it should not be a rent within the words of the Decree. As to the 1st in Latin a rent is called *redditus, ita dictus a redeundo sive a reddendo* inasmuch as all profits of what kind soever that come in annually, may be properly termed a rent, according to the opinion of *Lindwood*, Ot, in his chapter *Quantum autem*, and gloss. on the word *redditus*, for he says *quod vocabulo redditûs significatione intelligitur omnis fructus et est generalis ad omnem*

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utilitatem. If so then this rent of £25. *per Annum* reserved by way of Income cannot but be called a rent. As to the 2nd. its being a rent in common acceptation I say, that words are of the same nature as coin is; and as coin must be received according to its current value, so words must be taken in their current sense; and so it is said *communis usus loquendi prævalet communi significationi verborum.* And therefore in 34 E. 3. 24, it appears that a remainder limited to *Richard* the Son of *Richard Marewood*, is good notwithstanding he be a Bastard; and so in Law *nullius filius*, because in common reputation and understanding he is known by that description, so in Sir *Moyle Finch's Case*, 6 *Rep.* 65, where a fine was levied, with an exception of the Manor of *Brunstone*, it was holden that notwithstanding there was no such Manor *re vera*, yet as there was such a Manor in common reputation, the exception was good enough; so in *Carter's Case*, in 25 *Eliz.* it was ruled on the Statute of 1 *H.* 5. c. 5. that an addition by which a man is commonly known is a sufficient addition, though it be not his true addition, and therefore the addition of Gentleman in the Indictment was good, notwithstanding the party was in fact a Yeoman; in the Case at Bar therefore the £25. *per Annum*, it shall be a rent within the words of the Decree. As to the 3d, viz: the Judgement of the Law of this rent. I insist, that, notwithstanding the rent in the case at bar, is not any one of the three rents mentioned by *Littleton* in his chapter upon rents; yet that is no argument that it is not a rent in judgment of law; for there are many annual sums which the law calls a rent, and yet they are not any one of the three rents mentioned in *Littleton*; and therefore, in the *Register* 158 and 159, you will see, that the writ calls every annuity a rent; for it is said in the writ *præcipimus tibi quod justicies, A, quod justè, &c. reddat B. centum marcas*

marcas, decem quarteria frumenti et viginti robes, quæ ei a retro sunt de anno reditu centum solidorum duorum quarteriorum frumenti, &c. and F. N. B. 152, A. calls an Annuity issuing out of the coffers of another, or to receive from his person, a rent; and 9. Hen. 6, 12 and 53, an annuity granted by the Queen, *percipiendum de quâdam summâ assignatâ in partem dotis ipsius riginæ de magnâ custumâ London*, is called a rent; and in 1. Hen. 6. when a Lease for years was made of certain Sheep, rendering yearly for every sheep 4d. that sum so reserved, was called a rent. And it is such a thing that in debt brought for it, the defendant might wage his law. And in 30. *Ass. pl.* 5. where a lease is made of an advowson, or of the toll of a Mill rendering rent, this is called a rent; and yet it is not a rent out of any thing manurable, as *Littleton's* rents are; and for such a rent the King may distrain, according to 14. Et 3 and 5 *Rep.* 4, *Lord Mountjoye's case*. In the case at bar, therefore, there can be no reason but that the rent of £26 *per annum*, reserved by way of fine and income, should be a rent. As to what may be objected, that the before mentioned rents, should not be any rents within the statutes of 32 *Hen.* 8, c. 28. 1 *Eliz.* c. 19. 13 *Eliz.* c. 10; and therefore shall not be rents within the ordinance and decree in the case at bar, they are not to be compared together. For statutes are to be interpreted *secundum subjectam materiam*, and, therefore, those statutes aiming only at the benefit of the issue in tail, or successor of the bishop, &c., are to be intended to relate only to such rents as are incident to the reversion, and so may go to the issue in tail, or the successor of the Bishop. But there is no such respect to be had in this Decree, for it is all one to the parson and his successors, whether it be a rent, an annuity, or any thing else. As to the 4th point, *viz.* the understanding of the spiritual and ecclesiastical law,

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it appears by *Lindwood* in his chapter *de officio vicarii* that *Stephen*, Archbishop of *Canterbury*, in his constitutions directs, *quod ad minus redditus quinque marcarum assignetur vicario perpetuo*, and in his Chapter *De rebus ecclesiæ non temerandis*, where there is an ordinance *quod clericus inferior possessiones vel redditus dignitatis vel ecclesiæ sibi commissæ consanguineis vel amicis suis, &c. alienare non præsumat*, that the ecclesiastical law considered such annual pension reserved by way of income, to be as a rent; and it being a rent in their law, the judges who are wont to consult with all manner of professions, where there arises any difficulty as to those things which are properly known to other professions, (as in 9. Hen. 7, 16. pl. 8. where there was a consultation with grammarians, about the meaning of *puri auri*, in 11. Hen. 7, when there was a consultation about the validity of a Union) will of course give judgment according to their Law; and if they do then, they must adjudge this rent of £25 *per annum*, to be a rent within the words of the decree. And, I cannot but take occasion to commend the nobleness of our Law, which, though it is the *primum mobile* that attracts all the planets, yet applies itself to all other professions, and becomes all things to all men, that it may do justice to all; and therefore, in matters which belong to grammarians to discuss, it gives judgment according to the opinions of grammarians, as in the case before cited, and with respect to the meaning of the word *puero* in *Dy.* 337. a.: and where the matter is of a spiritual nature, and it belongs to the spiritual judges to discuss it, it gives judgment according to the spiritual law: and therefore, in *Cawdrey's* case, 5 *Rep.* an allowance was made to the pleading of a sentence in the ecclesiastical court, according to the form there prescribed; and where the thing is customary and concerns a custom, it gives judgment according to the custom; and therefore

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in 4 E. 3. 14, where an action of accompt was brought by an heir in gavelkind when he was only 15 years of age, it was holden, that an action brought at such an age was well enough, inasmuch as it was the full age of an heir in gavelkind according to the custom; and yet, by F. N. B. and *Littleton*, the age of an heir at common law upon the statute of *Marlbridge*, at which he may bring an action of account, is not until he attains the full age of 21 years, and so where an administration of the goods and chattels of an intestate, is committed according to the Statute of 31. E. 3. c. 11, the administrator shall have a defeasance avoiding an obligation, and other such things, and yet they would pass under the general words of goods and chattels: but rather than that the law will fail of giving remedy, it will apply particular words to general things. And for that reason in 8 *Hen.* 6. 34. *Br. lease* pl. 71, where the King made a Lease by these words, *committimus tibi tales terras, &c.* it was holden to be a good lease, and the law remitted somewhat of the strictness of the words, to the ancient usage of the exchequer. In the case at bar, therefore, the law will apply this £25 *per annum*, so annually reserved to a rent, and will construe it to be a rent, in order that the Parson may receive what is due to him under the decree. But, secondly, admitting that the £25 *per annum* was not a rent within the words and letter of the decree, yet it is a rent within the intent and meaning of it. And the decree may be taken by equity. 1st. because it was *pro bono ecclesiæ*, and so concerns our God, and for that reason a liberal construction is to be made of it. 2d. because it conduces to the maintainance of religion, *et summa ratio quæ pro religione facit.* 3d. because it tends to the avoiding of fraud, which here stares in our face, and it is in the *Cacus* to conquer, which is one of the labours of *Hercules*: and if penal laws, which trench upon the estate or life

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of a man, shall be taken by equity; as we find by *Littleton*, § 67. who holds, that an action of waste upon the statute of *Gloucester*, c. 7. may be well maintained against one who is tenant for half a year, notwithstanding, that the statute only speaks *de dimissione ad terminum annorum*; and by *Plowden*, 467, who is of opinion upon the statute of 1 *Edw.* 6. d. 12, that clergy shall be taken away from a man who steals a *horse*, notwithstanding the statute only speaks of those who steal *horses* in the plural number: then *a fortiori* shall this decree, which is *pro bono ecclesiæ*, and tends to the maintenance of religion and the suppression of *fraud*, be taken by equity.

And, therefore it seems, that if the rent of a Robe, or of a quarter of Corn or Grain, be reserved upon houses in London, and there are such rents as we have seen above, from F. N. B. and the *Register*; the Parson shall have tithes of such rents according to the value of those things, and yet they are not within the words of a rent of a Sum certain. And if the Lessee by the same Indenture by which the Lease is granted, covenants to pay £10 *per annum* to the Lessor for a House in *London*, this is a rent within the intent of the decree, so that the Parson shall have tithes of it.—4. The consideration which is decreed, is not by way of amplification for the increase of the Parson's revenues, but rather by way of diminution; for whilst the ordinance of Niger, Bishop of London, the Pope's Bull, and the constitution made by the Common Council, allow 3s. 6d. in the Pound annually, now this decree gives only 2s. 9d. in the pound *per annum*, and is an argument that the decree should be taken by equity. Besides this decree not enacting any thing new, but only making a Provision, that, whereas such offerings and at such time were paid for houses in London, there should be

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now such a Sum according to such a rate, paid at such a time, it is reasonable that a liberal construction should be given to it; and as to the objections that the constitutions of the Bishop of *London*, the Pope's Bulls, or the Acts of the Common Council, cannot impose any charge upon the Inheritances of Men; I will not maintain that they have any such power, but I say, that before any of these ordinances were made, or Papal Bulls granted, there was by the custom of London, such a duty due out of the Houses in *London* to the Parsons, as it appears by *Dr. Grant's case*, (*a*) where it is holden, that a suit may be maintained in the spiritual Court for those duties. And the original Instrument of *Niger's* Ordinance and the Pope's Bulls shew as much: for it is said that the Citizens of London shall pay such rates, '*prout etiam extentis longè retroactis temporibus et tempore præscriptibili per parochianos ecclesiarum dictæ civitatis consuetum extiterat.* 5. It appears by the ordinances that the rates shall be paid *prout domus et hospitia locabantur, sive locari poterant, secundum veram æstimationem*: the ordinances of ancient times therefore being so, and their being now an alteration in the manner of the rates, it is reasonable that this decree should be expounded according to the ancient ordinances, and that as the reservation of £25 *per annum*, by way of fine and income, tends only to defraud the Parson of his Tithes, according to a due proportion, and would have been a fraud, cursed with *bell, book*, and *candle* in ancient times, and as it shews that the House is of such a value to be leased, and would have been leased at that value, according to that rate then should the tithes be now paid. 6. As the decree has by an equity been interpreted for the disadvantage of the Parson, by the same reason should it be expounded by an equity for his benefit and advantage, and therefore, in 21 Eliz. in the King's Bench, it was adjudged, that

(*a*) ante, 38.

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when the owner of a House in London paid a rent to the King, which was given to him by the statute of 1 *E.* 6. c. 14, made against superstitious houses, he should only pay tithes according to the value of the House beyond that rent, and not according to the true value, and the law should be the same where he paid a quit rent or rent charge to another out of the House, for it is not reasonable that he should pay tithes according to the true value out of the House, and yet should be chargeable farther with a rent to another person. So then in the case at bar, since the owner has a benefit upon the reservation of the £25 *per annum*, by way of income; it is reasonable that the Parson should be respected according to that benefit which arises to the owner. As to the objection, that here is not any fraud at the common law, nor paid within the meaning of the decree, because the rent in which the fraud is supposed to be committed, and the person against whom it was intended, were not *in esse* at the time. I deny the ground of it, because it is repugnant to several Acts of Parliament, for it appears by the statute of *Marlbridge*, c. 6. that where the Tenant enfeoffed his first-born son, or a stranger, by collusion to defeat the Lord of his Wardship, it was fraud at the common law, and it is also fraud by that statute, and yet the Lord against whom the fraud was committed had no present right. So where one pending an action against him, makes a feoffment to his friends, to the intent to hinder execution from being had against him of his lands; this is fraud by the common law, according to 13 *Eliz. Dy.* 294. and it is also declared to be so by the statute of 27 *Eliz.* c. 4. and yet the judgment which made the land chargeable, was not in being when the feoffment was made. And I am of opinion that that if there be a Sale of Lands without any consideration, and afterwards the grantor become indebted

debted to the King, such Lands will be liable to the King's debt.—As to what has been put in the 34 *E.* 1. *Garranty* 88, that if before any purchase of the Lands in tail, the Tenants in fee make a feoffment of his Lands, and afterwards purchase Lands in tail and make a feoffment with warranty, there is no fraud at all in that, and therefore it is not to be resembled to other cases where there is fraud, And as to the objection which has been made, that the second branch of the decree shews that here has not been any fraud inasmuch as the rent which was of ancient time reserved, is here paid, and the second branch aims at no more than this, because where the ancient rent is not reserved upon a Lease, or there is no rent at all reserved, the penalty is only to pay tithes according to the proportion of the ancient reservation; I answer, that there has been a greater rent in time past than there is now: for there has been a reservation before in the same manner as the reservation is now made, so that notwithstanding *Burrell* has hoped to deceive the Church by fraudulent reservation by way of income, yet there being fraud in the intention and purpose, and fraud in the execution, *non ita effugiet et fallere fallentem non est fraus* and by reason of the preceding reservation he shall be forced to pay tithes according to the rate of it.

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An argument that tithes should be paid according to the rate of the reservation by way of fine and income, may be well enough drawn *a convenienti*. For justice being the rule of conveniency and the law being the rule of justice, if the law be that tithes shall be paid according to that proportion, then it cannot be denied, but that it is also convenient. And that the law is so is manifest. 1st from human provisions, that is the common and statute law of which as

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as I have made mention before I shall not insist upon them now. It is *jus divinum*; for though the Canonists differ upon the question whether *decima pars* be due *jure divino*; yet they all agree that there is a convenient portion due for the maintenance of the Minister: whence it follows that this proportion of 2*s*. 9*d* in the pound, being manifestly a convenient portion for the maintenance of the Minister the substraction of it is *contra jus divinum*. 3. The law of the custom of the City says, that a payment ought to be made according to the reservation of rent as we see by Dr. *Grant's* case, 11. *Rep. et consuetudo ea rationabili causa usitata, privat communem legem* be it the *jus scriptum* or the *jus non scriptum*. 4. The law of the *consulta prudentum* has directed the payment of tithes for houses in London, to be made in this manner as *Niger* Bishop of London, in the time of *H*. 3 Pope *Innocent*, in the time of *H*. 4 Pope *Nicholas*, in the time of *H*. 6 the order, decree, proclamation, and statute, in the time of *H*. 8 which payment therefore ought to be now continued accordingly, not fraudulently substracted contrary to Law and Justice. 5. The Law, from the danger to which Ministers of London expose themselves more than any other Ministers of the Country do, requires the payment of Tithes at the hands of their Parishioners according to the due proportion allotted to them; for they are bound to be resident and give comfort to their flock in the time of the plague, when their bodies are subject to the danger of infection, their minds to fear, and their souls to sorrow, so that being in greater danger than other Ministers are, they ought to have a greater reward than others have. There are many other conveniencies which I will not now insist upon, because in speaking of them at this time and in this place, I should be like a *Phormio* teaching the precepts of

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War to an expert *Hannibal*. And as to the objections which have been made, that if Tithes were to be paid *secundum veram æstimationem* every parish would be as great in value as a Bishoprick. I answer, 1st. That this parish of Gracechurch being a parish consisting of very few families, is not in danger of that abundance. 2. The value will not be proportionally greater now, than it was before the making of the Statute of 37 *H.* 8 at which time there was a greater sum paid. 3. Where the parishes are so large, there is a means afforded of associating other learned men to them and of endowing vicarages. And as to the objection that houses are for expence and hospitality, and therefore not to be resembled to Land. I answer, 1st. That that objection might have been made before the Statute, and there is no better ground for it now than there was then. 2. The Statutes of 27 *H.* 8 and 37 *H.* 8 do not conceive any deduction to be necessary for the repair of houses, as the 1 *E.* 6 does for barren ground, and therefore they made no provision for it, nor are we to make any. 3. The Law favors agriculture more than houses, the one being more beneficial to the commonwealth than the other.

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In the following term *viz. Tr.* 16 *Ja.* the case was argued in the same place by Sir *Tho. Coventry* the King's Solicitor, for the Defendant.—He said I shall consider, 1st. How the case stood before the Decree. 2. I shall consider the several parts of the decree. As to the first point before the Decree and the Act of Parliament, there were not any Tithes due by course of the common Law of houses in *London*. 1st. In regard that Tithes are only due of such things as yield an increase of which nature houses are not, for they rather decrease than increase, inasmuch as they require reparation. 2. Tithes are due out of the profits and revenue of things, and

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and do not charge the Inheritance, and it is for that reason that they are determinable in the Ecclesiastical Court, for if they charged the inheritance then they would be determinable at Common Law; but of houses there is no profit or revenue and therefore Tithes cannot be due of them. 3. Tithes are things collateral to the Land and not issuing out of the Land, and therefore according to 42 *E.* 3, 13 and 30 *H.* 8 *Dy.* the Parson shall have Tithes of Land contrary to his own feoffment or lease, and in 7 *E.* 6 *Dy.* in an assise for a portion of Tithes it appears that it is not necessary to name the terretenant. But if Tithes were to be paid of houses then they would issue out of houses, which is contrary to the rules of Law. 4. It has been often adjudged, that houses are discharged from the payment of Tithes by the Common Law, without a special custom and for this reason in 39 and 40 Eliz. in the common pleas, between *Dalison* and *Romer* it was adjudged that Tithes, were not due of houses and with that accord the resolution in *Dr. Grant's* case and the case of *Dr. Leyfield*, (*a*) in the 12th of *James* in the common pleas. 2. Notwithstanding Tithes were neither paid nor due for houses in London, yet from the beginning, the Ministers of London had a competent provision made for them by Glebe which was given to them. Oblations, obventions and other casual duties which arose upon marriages, christenings, burials and such other things, as it appears by 30 *E.* 3 and 38 *E.* 3 13; and by the records in London it appears that the offerings for houses in *London* where paid in this manner, for he who paid 20*s* rent on every Sunday or every Apostle's day, the Vigil of which was a fast, paid a halfpenny; or if he paid but 10*s* rent, he was to pay only a farthing, which amounted at the most but to 2*s* 6*d* in the pound

(*a*) ante, 40.

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and sometimes indeed it was less, as when one of the Apostle's day's fell upon a Sunday, for then there was only one halfpenny or farthing paid for both, and this manner of payment rather decreasing, it was established by constitution of *Roger Niger* Bishop of *London*; and it so continued without any alteration till the 13 *R.* 2, when *Thomas Arundel* Arch-Bishop of *Canterbury*, made an explanation of the constitution and obtruded upon the Citizens of *London*, twenty two days more than were usual, which raised the sum to 3*s* 6*d* in the pound. And this explanation was confirmed by Pope Innocent in 5 *H* 4 and afterwards by Pope Nicholas in 30 *H* 6; But there was a constant struggle on the part of the Citizens, against this explanation and the records of Guildhall in 32 *H.* 6. state this order of explanation to be *destructorius* rather than *declaratorius*, and to be obtained *surreptivé et abruptivé*, without summoning the Citizens, and without any assent to it on their part, and thereupon there was after that time a perpetual agitation between the Ministers and Citizens of London, in the Court of Rome, and in ecclesiastical courts about the payment of those offerings, until at length it was settled by the decree made in 27 *H.* 8, when it was established according to the purport of the decree. And upon the several parts of this decree, arise the two questions which have been made and argued on the other side, the first of which is, whether, as the £25 were reserved by way of fine and income, payable during the term at the same days and feasts, as the rent of £5 is payable, whether Tithes shall be paid according to the rate of £5, only or according to the rate of £30, and if the £25 shall be said to be a rent? 2. Whether the reservation of this £25 *per annum* by way of fine and income, shall be said to be a fraud to evade the Statute? as to the first question I say that this £25 which is reserved

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reserved by way of fine and income, cannot be said to be any rent of houses, for according to *Littleton*, there are only three rents, namely a rent-service, a rent-charge, and a rent-seck, and this fine and income cannot be said to be any of these three rents, whence it follows that it is not a rent, *et argumentum a divisione fortissimum*. 2. This fine and income has none of the qualities and properties of a rent; for 1st. There is no distress incident to it, 2. upon an eviction of the house there will be no discharge of this fine, 3. there will not be any apportionment of this fine, upon an eviction or grant of part of the house, 4. upon an entry or feoffment over of the house, there will not be any extinguishment or suspension of the fine, 5. this fine or income is not incident to the reversion, nor will it pass with it, 6. it shall not be said to be a rent either in respect of the Lessor or in respect of the Lessee, for in respect of the Lessor it is a *Chose in Action*, which cannot be granted over, and which will go to the Executor and will not descend to the heir; and in respect of the Lessee, it will not bind as a rent will do; and for that reason in the Book of 45 *E.* 3, 11, if a Lease be made to baron and feme with such a reservation of a fine as in the case at bar, it will not bind the feme, notwithstanding that she agreed to the Lease, as another rent would do, and 10 *Eliz. Dy.* 275 in the *Lord Darcey's* case is was resolved that where such a reservation was made as in the case at bar, the King should not have the rent, nor could relief be given upon the ground of fraud.

As to what has been objected, that the fine in the case at bar, shall be said to be a rent for five reasons. 1. from the etymology; 2. from the common appellation; 3. the judgment of the Common Law; 4, the judgment of the Ecclesiastical Law, which is to be regarded

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regarded in a case of Tithes; 5. from the intention of the Decree. I answer, that as to the etymology, which is *a reddendo vel redeundo*, in which *omnis fructus* is comprehended, that is not sufficient to draw it within the general word of a rent, but it must be a rent of houses, according to the words of the Decree and *Nigers* constitution, which calls it *pensio domûs* and *Lindwood* who calls it *pensio quæ provenit ex domo*; and this fine and income cannot be said to be a rent of a house, nor to be recoverable from it, because this fine charges only the person, whereas the rent of a house charges the house, and the person is only charged in respect of the house; and therefore notwithstanding the house be burnt and consumed, or the lease thereof utterly avoided, yet shall the lessee pay this fine, for his person is bound in respect of the collateral covenant, and the rent neither issues nor is it rendered out of the house. Then as to the 3d point, *viz.* common appellation, this is not a rent even in that sense; for the *Lordmors* take notice of this as a fine and income, and call it so, and not a rent; but admitting that this fine were a rent in common appellation, that is no argument to make it a rent within the interpretation of a Statute, which requires a legal interpretation, and not a vulgar appellation, according to the case of 13 & 14 *Eliz. Dy.* 296, b. where it is adjudged that a bastard shall not be a child advanced within the Statute of 32 H. 8. c. 1., and yet according to 39 E. 3. he is a son in common appellation, for he is *filius naturæ*. And if a Parson or other Ecclesiastical person covenant that another shall enjoy his land for so many years, notwithstanding this is a lease in common appellation, yet it is not a lease within the Statute of 13 *Eliz.* c. 13. so as to be avoided, for the Statute of 14 *Eliz.* was made on purpose to avoid such sort of covenants. Besides the Statute of 27 *H.* 8. being framed

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framed by grave and learned men who are named in the Statute and Decree, it is not requisite that an interpretation be made according to vulgar appellation, they being sufficiently conversant what phrases to use. But admitting that an interpretation were allowable of a rent according to common appellation, yet this fine is not a rent within the compass of the Decree, because this matter of reservation, by way of fine and income, was not in use before the making of the Decree and Statute of 27 H. 8., and not being a rent in common appellation at that time, it cannot be drawn within the Statute at this day, notwithstanding that it be now a rent in common appellation: and *Carter's* case in *25 Eliz.* does not make against this, because that Statute was made on purpose to be applied to a vulgar appellation.

As to the 3d cause, *viz.* the judgment of the Common Law, notwithstanding that the lessor, in his reservation of it, calls it a rent, where it is reserved out of a mill, out of an advowson, or out of goods, yet in judgment of law it is only an annual payment, and not a rent; and so the judgment in law is that it is not a rent, as we see by 1 H. 6., 9 H. 6. whatsoever the reservation of the party may be. It is to be observed too, that 11 H. 4. & F. N. B. calls it *annus redditus*, and not by the name of *quatuor libratas reddidit*, which is that by which a rent is demanded, as we see by the books before cited, and therefore the books which are produced to prove an annuity to be a rent in judgment of law, strongly prove the contrary, for, 1. A rent is not demanded by the name of *annui reddidit*, but of *quatuor libratarum redditus*. 2. The Warrant of Attorney, in a Writ of Annuity, is in a Plea of *Debt*, whereas in a precipe for rent it is in a Plea of *Land*, according to 11 H. 4., which shews that *annuus redditus* and a rent

rent are different. 8. It is not sufficient to prove it a rent in judgment of law, without proving it to be a rent out of a house, and of that nature this fine and income is, not because it is a *chose in action*, which charges the person like an annuity, and is not grantable over; and if an annuity be granted to pay out of a person's coffers, the grantee must resort to the person of the grantor, to charge him in a Writ of Annuity, and cannot go to the coffers to take the annuity out of them. As to the 4th point, viz. the judgment of the Ecclesiastical Law, it is not material in the case at bar what that may be, for a construction is not to be made in this case of Canons of the Church, or any other part of Ecclesiastical Law, where their exposition and judgment are to be received, and credit is to be given to them, but an exposition is to be made of an Act of Parliament, which is part of the temporal law; and such exposition must be according to the temporal law, notwithstanding that it concerns Ecclesiastical things. And for this reason it appears by 7 *Eliz. Dy.* 237. 8 *Eliz. Dy.* 255. 4 *Rep. Holland's* case, that the Statute of 21 H. 8. is expounded to make an avoidance without any declaratory sentence, according to the common law, notwithstanding it concerns an Ecclesiastical person. The same exposition is also made of the Statute of 13 *Eliz.* c. 12.; for not reading the articles, as we may see by 23 *Eliz. Dy.* 377., and 30 *Eliz. Morris* and *Eaton's* case, and yet it concerns both an ecclesiastical thing and an ecclesiastical person. It is to be observed too, that the Act of Parliament makes the Lord Mayor of *London* and the Lord Chancellor of *England* the expositors of this Statute, for which reason an exposition is to be made according to the Common law, and not according to the judgment of the Ecclesiastical law; and prohibitions have been often granted where a libel has been exhibited in the Ecclesiastical Court for the Tithes of rent of

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houses in *London*, as was done in the case of *Price* and *Watts*, 34 *Eliz.* B. R. and M. 5 Ja. in the case of *Skidmore* and *Bell* in C. B., and in the case of Dr. *Prouse Tr.* 15 Ja. which shews that the Judges of the Ecclesiastical law are not judges in this case, but that judgment is to be given according to the rule of the common law. Here are no *latin* words for the grammarians, nor civil law terms for the civilians to give their exposition of; but here is a plain *English* Statute, of which a construction is to be made according to the rules of the Common law. And it hath been often adjudged, upon the Statute of 31 E. 3. c. 11., which warrants the granting of administration of the goods of an intestate, that a lease for years is *bona* within that Statute. And in 7 H. 4, 6. it is ruled upon the Statute of 4 E. 3. c. 7., which gives trespass, *de bonis asportatis in vitâ testatoris*, that executors may have an *ejectione firmæ* upon an ejectment in the life of the testator; and so they may have a ravishment of ward, according to 11 H. 4. 55. As to the 5th point, *viz.* the intent of the Decree, I insist that this fine and income of £25 *per ann.* is not a rent within the intent of the Decree, for when an Act of Parliament speaks of a rent it must be intended to be such a rent as is properly a rent, as where an Act of Parliament makes mention of escuage, it is to be understood ofthat which is properly escuage, which is escuage uncertain. Besides every rent is not within the compass of the Decree, and therefore if the rent be not of a certain value, as if the rent reserved be a spur, or a horse, &c. without the addition of any value, it is not a rent within the Statute, not being of any certain value. So it must be a yearly rent, for which reason if it be a rent of that kind upon which an Action of Debt does not lie till the last day, as in *Walker's* case, 3 *Rep.* 22. and *F. N. B.* 130 *H.*, and in the case at bar it is not a rent within the intent of the Decree. It appears by an examination of the several branches

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branches of the Decree, that the rent which the Decree has in contemplation, is such a rent as is properly a rent, and arises upon a reservation and issues out of the houses, for the first of those clauses is *where any lease, &c. shall be made of any house reserving less rent than hath been paid, &c.* The second is, *where any person shall demise any dye-house or brewhouse or the like, reserving a rent, &c.* The third clause is concerning the payment of Tithes, according to the rates of those several rents reserved, so that if there be not a rent reserved and issuing out of the houses (and the fine and income in the case at bar is not such) then it is not within the intention of this Decree. But farther, the Decree has a clause for an abatement of the rent in case where the house is burnt, and this income is not within that clause, because it shall be paid nothwithstanding any such casualty, and there is no need of any new reservation. And by a clause in the Decree, assignees are chargeable according to a proportion with the rent, and there cannot be any apportionment of this fine and income, and therefore it is not within the intention of the Decree. Nor is it the intention of this Decree to take up the rack-rent, for that is contrary to the intent to all the other acts, as 31 H. 8. c. 12., 37 H. 8. c. 12., 1 E. 6. c. 13., Eliz. c. 10., which only aim at the reservation of the ancient rent, and if the makers of the Decree had aimed at the value of the houses they might have said a rate to be paid according to the value of the houses, and not according to the reservation of the rent. And if Tithes should be paid for this fine and income, there might be a payment beyond the value of the house, for the lessee is bound to pay this income whatever may become of the house, and therefore it is possible that the house might be forfeited, or there might be an eviction, or a new lease might be granted of it, and then Tithes would be paid for it according to

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this income, and also according to the proportion of rent newly reserved, which is contrary to the intention. It never could be the intention of the Decree to oppress young tradesmen, and if the law should incline to this exposition, that Tithes should be paid according to the proportion of this income, they would be oppressed; for either they must pay great sums immediately which they are not able to do; or beyond their fines and incomes, which they pay annually, they must pay an eighth part more for Tithes, which would be exceedingly mischievous. Besides it would be very inconvenient to force men to lease their houses at a rack-rent, as suppose they should be tenants in tail, &c. for after they have once received the rent they cannot lower it when they will. And as to the objection that this construction to pay Tithes according to the proposition of income is *pro bono ecclesiæ*, and therefore is to be extended as far as it can be, I answer, in the first place, that it is observable that this Decree is made in enlargement and amplification of what was paid to the Ministers before, and not by way of diminution; for whereas only 2s. 6d. was due before the Decree, now by the Decree, it is at the rate of 2s. 9d. in the pound. 2. This rate of 2s. 9d. in the pound being more than is allowable either *jure divino* by the Common law or by custom (for those laws allow only a tenth part, whereas it is an eighth part) it is not reasonable to extend it farther than the words import. 3. There being an imposition of the payment of Tithes upon several things, as dye-houses, brewhouses, stables, gardens &c. upon which there was not any imposition before, it was consistent with reason only to give an allowance of payment of Tithes according to the rate of what is properly a rent, and not according to the rate of the fine or income, and the more especially so, because the ancient constitution was that Tithes should be paid at the rate *prout domus locabantur* and not *prout locari poterunt.*

poterunt. 4. The Decree imposes fine and imprisonment upon those who do not pay their Tithes, and therefore it is to be *stricti juris*, as we see by Dr. *Bonham's* case, in 8 Rep.

As to the second question which is whether this reservation of £25 *per ann.* by way of fine and income, be a fraud or not, I say, 1st. that it cannot be a fraud upon the rules of the Common law, because the person against whom the fraud is supposed to be committed had no interest at all in the £25 *per ann.* in the reservation of which the fraud is supposed to consist. For there was only £25 *per ann.* anciently reserved, and he who shall have remedy against fraud at common law, must have a precedent interest according to the cases of 22 *Ass. pl.* 72. 43 *E.* 3. 2., 48 *E.* 3. 12., 8 *E.* 2., *Assise* 936 3 *Rep.* 83., *Upton* and *Bassett's* case, in all which cases there was a precedent interest in the person supposed to be defrauded, and for that reason he had remedy at the Common law. But, if there were no such precedent interest, then there was not any remedy given, as where a villein alienated his goods by fraud, the Lord had no remedy for them, because his interest commenced only upon the claim or the seizure. And upon 17 E. 3. 54., and 3 E. 3. *collusion* 29, where the tenant alienated by collusion, the Lord had no remedy before the Statute of *Marlbridge*, because he had no interest precedent to the alienation. And before the Statute 3 *Ja.* c. 5., if a recusant had purchased lands in the name of another person, the King had no remedy for those lands, because he had no precedent interest. So in *Myght's* case in 8 *Rep.* where the Father and Son are joint purchasers of lands holden *in capite* there is no remedy for the King, and I conceive that this reservation is not a fraud nor material; inasmuch as the fraud, if it be a fraud, rests in non-feasance, *viz.* in the non-reservation of rent out of

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of the house; and the common law extends only to a fraud which consists of a misfeasance, and not to one which consists of a non-feasance; and therefore where a usurpation was had upon an infant or feme-covert by fraud, there was no remedy before the Statute of West. 2. c. 5., it being a fraud that consists of non-feasance. And the reservation of £25 *per ann.* by way of fine and income cannot be worse than it would be if there were no such reservation. And if only the £5 *per ann.* had been reserved without reserving the income, it had been well enough, because the ancient rent was reserved, and the law requires no more. I conceive that this can be no fraud upon the Decree itself, for the Decree only extends to cases where either no rent is reserved, or there is less than the ancient rent reserved, and there is no provision to compel the reservation of a greater rent. 2. The fraud and covin mentioned in the Statute goes to the payment and not to the reservation; and here being a payment of Tithes according to the rent of £5 per annum, which was the ancient rent, the Statute will not extend to it. 3. Upon the Decree itself: if *Burrell* had not made any reservation of rent at all, he would have paid only after the rate of £5 *per ann.* he shall not therefore be now in a worse plight than if he had not reserved any rent at all, which being so, it is a very strong argument that Tithes should be paid only after the rate of £5 *per ann.*, and not according to the rate of the income, and the reservation of the income should not be said to be fraudulent, and to be made by fraud, in order to evade the Statute. As to what has been objected of the conveniency of having Tithes paid according to the proportion of the income. I admit that the rule of justice is the rule of conveniency, and that what is just is convenient. And if the law be, as I have argued it is, then upon the rule of justice Tithes ought not to be paid after the rate of £30 *per ann.* but only at the

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the rate of £5 *per ann.* And the Statute of 37 H 8. c. 12., is as well a restriction upon the Parsons that they shall not demand more than 2s. 9d. in the pound, as it is an obligation upon the citizens that they shall pay according to that proportion. And as to the argument which has been drawn from the Divine right, that can be of no avail in the case at bar, because the 2s. 9d, in the pound being more than the tenth part, it is more than can be demanded by the law of God. And as to the argument which has been drawn *a consensu civitatum et sapientum*, neither of those will warrant the opinion of the payment of Tithes according to the rate of the fine and income; but the contrary. And as to the argument which has been drawn *a convenientiâ rei*, if we are to be determined by this, it could never be the intent to require a payment of a greater proportion, than according to the ancient rent, for it would be inconvenient, 1st. to compel men to lease their houses at rack rents. 2ndly. It would be a great imposition upon those beginners, who are unable to give fines in *pecuniis numeratis*. 3dly. It would be a discouragement to laying out any money upon their houses, since their charge would be raised according to the money laid out. 4thly. It would be the disturbance of a settled opinion which hath been holden time whereof the memory of man runneth not to the contrary. 5thly. The *London* benefices would be greater than many bishopricks in *England*. And in M. 5. *Ja.* in C. B. where *Skidmore* and *Eire* were Plaintiffs in prohibition against *Bell*, parson of *Queenhithe*,(a) it was resolved that there could be no suit in the Ecclesiastical Court for Tithes of houses in *London*, because the Statute had appointed other persons to be judges in that case. 2dly. It was agreed that no Tithes could be demanded of those houses

(a) ante.

which

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which were built subsequent to the making of the Decree, because the Statute extends only to those houses which paid Tithes before. 3dly. It was resolved, that a greater proportion could not be demanded of houses in *London* than according to the ancient reservation, and that no respect was to be had to fine and income. Meadhouse *v.* Taylor.(*a*)

It was agreed by the Lord Chancellor and the other assistants, 1st, That the £25 *per ann.* reserved by way of fine and income was not a rent. 2dly. It was ordered that the records which had been cited should be produced. For if the rate paid of ancient time was only 2s. 6d. and so the Decree went in amplification of the ancient proportion, then it was of some moment, *Niger's* constitution being *ex antiquâ consuetudine et tempore præscriptibili.* 3dly. The record in the 32 H. 6. was a record made by the citizens themselves, and therefore not of so great authority.

16 JAS. 11th May, 1618.

IVATT *v.* WARREN and OTHERS.

Gwillim, 1054.

Plea to the Jurisdiction of the Court of Exchequer of the Tithes of houses in London *over-ruled.*

WHEREAS *Elizabeth Ivatt*, Widowe, exhibited an English Bill into this Honourable Court against *Symon Warren*, *Thomas Burmsowe*, and other Defendants setting forth thereby; that the late *Queene Elizabeth* being seized in right of her Crowne of England of and in the impropriation of the Parishe Churche and Rectorie of *St. Buttolphe's without Algate*, *London*,

(*a*) ante, 35.

don,

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don, and all messuages, barnes, stables, oblations, obventions, duties and appurtenances to the said Rectorye and Parishe Churche belonginge, by her Grace's letters patents, dated the viii^the^ date of *June* in the xxx^the^ *yeare of her reigne*, demised unto one *George Puttenham, Esq.* the said rectorye and impropriation for divers yeares yet to come, enduringe and under the rent of xxii*l. per annum*, and under divers covenants therein expressed; and after the death of the said late Queene the inheritance thereof decendinge to *his Majestie* that nowe is, it pleased his Majestie amoug other things to grant the reversion and the said inheritance unto one *Francis Phillips* and *Francis Moris*, Esquires, under the fee farme rente of *xxi*l. per annum. And sheweth that the said inheritance and the said interest of the said rectorye by meane convyances coming unto *Sir Thomas Carsfield Knight*, *Robert Fulnetbey*, Esq. and *Thomas Ailworth*, Gent. they by theire indenture bearing date the *xx*^th^ *of November* in *the xii*^th^ *yeare of his Majesties reigne* demised the said rectorye with the appurtenances unto *John Ivatt* the Plaintiff's late husband, from the birthe of our Lorde God next followinge after the date thereof during the terme of eleavene yeares; and that the said *John Ivatt* beinge possessed of the said rectorye by virtue of the said demise made his last will and testament in writinge, and thereof made the Plaintiff his executrix and died, after whose decease the Plaintiff prooved the said will and thereby became possessed of the said lease and rectorye and ought to receive all duties and Tithes belonging to the said rectorie accordinge to the aunciente customes, ordinances, decrees, lawes and statutes of this Realme of England which the parishioners and inhabitants of the s^d^ parishe within the *Cittie* of *London* and liberties thereof ought to paye unto the Plaintiff for the Tithes of theire several howses after the rate of ii^s^ ix^d^ in the pounde. And that the Defendants,

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mts, with others of the parishioners combyninge togeather, goe about to defraude the Plaintiff of her just and due Tithes by takinge greate fines and reservinge small rents, which in time may be a meanes to impaire and diminishe his Majesties fee farm; and for reliefe therein praied the ayde of the Court; upon which Bill proces of subpœna beinge awarded against the Defendants, the said Defendant *Warren* and others appeared in this Court and putt in theire plea, unto the said Bill; and thereby sett forth that there is noe lawe for the payment of Tithes for howses within the *Cittie* of *London* and suburbs thereof, but onely by a Decree confirmed by Acte of Parliament made in the xxxvii^th^ yeare of the reigne of King *Henry the Eighth*, in which decree there is a provisoe that if anye variance do arise for the payment of Tithes in *London* and the *liberties thereof*, that then upon complaint made to the Lorde Mayor of the said Cittie his Lordshipp shall end the same, or if he shall not end the same within three months, then upon complaint to be made to the *Lord Chancellor of England* for the time beinge, his Lordship should end the same, and thereby demanded judgment of the Courte whether they ought to make any other answere to the Plaintiffs Bill; as by the said plea heere remayninge of record appears; which plea by an order of the xxviii^th^ of *January* anno xiii^th^ *Regis Jacobi* was over-ruled and the Defendants enjoyned to make direct answeres to the Plaintiffs Bill: And the said Defendant *Warren*, by severall orders of this Courte did putt in severall answeres and thereby sett forth that there was a custome within the said parishe that both at the tyme of the s^d^ Decree and since the parishioners of the said parishe have paide a less sume of the Tithes of their howses then after the rate of two shillings and nine pence in the pounde. And the said *Warren* also saide that he dwelleth in the howse of *Amable Coxe* within the said parishe

parishe and that about twoe yeares past he tooke the lease of the said howse of the said *Amable* for the tear e of xxi^tie yeares, and under the rent of nyne poundes per ann. and that he paide unto her xx*l.* for a fine. And further said that he thought he was not chargeable in lawe to paie Tithes for the same by reason of an expresse clause mentioned in the saide Decree that where a lesse summe then xvi^d ob in the x^s rent and ii^s ix^d in the xx^s rent had beane accustomed to have bene paide for Tithes, then in such places the inhabitants shoule paye after such rate as hath bene accustomed to be paied for Tithes; and also that there is another proviso in the said Decree that the same should not charge any sheds which were not parcell or belonginge to any mansion-howse, nor should paie any Tithes for the same, but the same ought to be freed from the payment of Tithes; and he further saide that about three or fower yeares since the said *Amable Coxe* did erect and build the house wherein the said Defendant Warren now dwelleth parte upon a shedd and parte upon the wast grounde belonginge to the howse wherein *Robert Coxe* late husband of the said *Amable* lately dwelt, and occupied the said shedd and wast grounde together with his mansion-howse and paide to the proprietor of the said rectorie or parsonage fower shillings *per ann.* for the Tithes of the said mansion-howse, shedd, and wast grounde, for which reasones he saith that he hath forborne to paye anye Tithes for the said howse and ptlye by reason of a grawnt or covenant made by *Thomas Scot Esq.* and *Bridgett his wife*, whoe were reputed the proprietors of the said rectorie, unto the said *Amable Coxe* that shee the said *Amable* should not be compelled to paye for the said howse wherein the said *Amable* dwelleth, with the shedds and wast groundes, nor for any howses or buildings to be erected uppon the same, but onely fower shillings per ann. for the Tithes thereof for the tearme of threescore years;

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as by the saide severall answeres remayning in this Court more at large appeareth: unto which the Plaintiffs replied, and the Defendant *Warren* rejoyned and decended to a perfect issue, and since there were several orders for the bringinge in of the Tithes into this Courte due from the Defendant *Warren* after ii^{s} ix^{d} in the pounde accordinge to his rent of nyne pounds per ann. to be delivered to the Plaintiff; but by an order of the xii^{the} of February last the said *Warren* was to bringe three pounds fowerteene shillings threepence for three yeares Tithes into this Courte, there to remayne untill the hearinge of the cause, and for wytnesses to be examined on both parts, and publication to be had the first daie of this Easter Terme, and the said cause to be hearde the seconde sittinge of this terme at Serjeant's Inn, as by the said order appeareth; and this presente daie the said cause cominge to hearinge before the Lord Chiefe Baron, and the residue of the Barons of this Courte, in the presence of the learned counsell on both parts, touchinge the Tithes due and paiable by the said *Warren* for the howse he nowe dwelleth in, where upon a full and deliberate hearinge of the said cause, for that the Defendant made noe sufficient proofe of anye custome within the said parishe for the payment of the Tithes, or that the said howse was any more discharged by the braunches or provisoes of the saide Decree and Acte of Parliament, of the xxxvii^{the} *yeare of Henry* the Eight, or that the covenant mentioned to be made by *Thomas Scott* and *Bridgett* his wife to the said *Amable* ought any waye to prejudice the Plaintiff, and the saide Courte conceyving the meaninge of the said Decree and Acte of Parliament was, that the inhabitants within the Cittie of *London* and liberties thereof ought to paye for the Tithes of their howses after the rate of twoe shillings nine pence in the pounde according to the true value as the same were worth to be letten per ann., and that

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that if the same had beene a shede, as was pretended, yet ought the same to be discharged of Tithes noe longer than the same is contynued a shed, for beinge converted to a dwellinge house the same ought to paye the Tithes accordinge to the true value. It is thereupon ordered and decreed by this Courte that the said sume of three poundes fowerteen shillings three pence due for the three yeares Tithes nowe remayninge in Courte shall be forthwith delivered to the Plaintiff, and the said Defendant *Symon Warren* to paie the residue of the Tithes now due unto the Plaintiff besides the said Tithes now remaining in Court, and shall from henceforth paie to the Plaintiff or her assigns, or any other that shall be proprietor or farmer of the saide rectorie, for the Tithes of the said howse xxiiii^{s} ix^{d} per ann. to be paid quarterly, by equall portions, accordinge to the true intent and meaning of the said Decree of the xxxvii^{the} of *Henry the Eighth*, and that all those who shall hereafter inhabite and dwell in the saide house shall paie the Tithes for the same as is before expressed, accordinge to the true intent and meaninge thereof. And it is likewise ordered that the said *Symon Warren* his exõrs or admõrs shall paie forthwith unto the Plaintiff or her assigns the sume of sixe poundes thirteene shillings and fower pence towards her costs and charges sustayned in the prosecutinge of the said suite.

Trinity Term, 4 CAR. A.D. 1628. In Scac.

Dr. BURGESS v. SYMONS.

Litt. Rep. 102. 141. *Gwillim* 433.

Qu. Whether there may be a suit in the Exchequer for Tithes of houses in London upon the Stat. 37H.8

DR. BURGESS, parson of St. *Magnus* upon *London-bridge*, sued here, upon the Decree confirmed by the Act of Parliament of 37 *H.* 8. c. 12. concerning Tithes in *London*, for Tithes; and for privilege, shews, that the King has four Nobles a year revenue out of it. There was a Demurrer to the jurisdiction, and for the Doctor precedents were alledged: one of 16 *Ja.* 1. (*a*), where the Parson of St. Botolph's Without, Bishopsgate, being impropriator upon a Grant in fee farm sued here,

FINCH, *Recorder.*

Those precedents might be of Tithes claimed by custom, and for such they may well sue here, or in Court Christian; but for Tithes grounded on the Statute, or which have their commencement from the Statute, and *not otherwise*, they ought not to sue by any other method than that which the Statue directs; nor before any other than the Judge appointed by the Statute. And as for Tithes for houses there are none, unless the same be given by this Decree, any more than there were Tithes payable for a mill before the Statute of *Articuli Cleri*, but newly erected mills pay Tithes; for no Tithes are due for Freeholds by Common law: and yet at Common law Wood and Underwood were Titheable, though before the severance it was parcel of the Freehold—and so says *Doctor* and *Student*.

(*a*) ante, 88.

And

And it appears also by a record of 2 *R.* 2. among the Parliament Rolls, whereby the commons pray that Wood may be ascertained, for they say that before the great plague no Tithes were paid for any sort of Wood, but this was altered by the Statute of *silva cædua* 50 *E.* 3, and it first obtained at the constitution of *Winchelsea*. And at this day no Tithes are payable for *Mines* and *Quarries*, unless by custom; so that there is no other foundation in the present case but the above Decree affirmed by Parliament, by which no Court but the *Mayor* of *London* can take cognizance of it; and to this purpose is the case of *Skidmore* v. *Bell*, 5 Ja 1. (*a*), where, upon debate, a prohibition was awarded. And this case was compared to that of the *Orphans* of *London*, where the Court will award a prohibition if any spiritual Court interferes with their Estate, though it be only by private custom, *Walters* 38 *Ass.* The King's Farmer sues here for Tithes, so that this Court may hold plea of Tithes in some cases; and there have also been cases, in which the question was, whether Tithes should be paid upon letting, on lease, houses in *London* with great fine and rent; and for this particular this Court has had jurisdiction, but we will advise further:—

In the next Term the case was argued again; and *Walters* said that he willingly gave up the great question of jurisdiction, having enquired what the case was between the parson and the other; and it appeared that the parishioner farmed a house at Five Pounds rent, and, as it stood empty, he, not being able to get a Tenant by reason of the great Plague, would not therefore, during that time, pay Tithes.

(*a*) ante, 36.

But

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But *Walters* said, as this was the case, he would advise him to pay Tithes; and further, that he could shew the case adjudged where one leased a house in *London*, rendering Rent, and afterwards purchased the same house in fee, though no rent was paid for it; yet the parson shall have Tithes according to the rent last paid. But if one builds a new house, and inhabits it, or leases it rent free, the parson shall not have Tithes or remedy. And this is not the great case so much litigated, whether Tithes shall be paid for the increase of Rent, when the lessee makes under leases, reserving greater rent, nor the case of Tithes, according to the fine taken from the lease which has been lately resolved; and therefore he advised the Defendant to agree with the Parson, and pay his Tithes.

Qu. When resolved.

Easter Term, 9 CAR, 9. A. D. 1657.—Scac.

SHEFFIELD v. SERJEANT.

Hardr. 102. *Burn's Eccl. Law*, 466. *Gibs.* 1223.

The Court was divided in opinion whether he that is in by sequestration be relievable from customary Tithes in London, according to the Decree confirmed by the Statute 37 H. 8. c. 12.

UPON a Bill in Equity, to be relieved from Customary Tithes in *London*, the case was that the Plaintiff's Title was under a sequestration by Parliament, and an Order thereupon by the Committee for plundered ministers; and the question was, whether he was relievable according to the decree confirmed by *Statute* 37 *H.* 8. chap. 12. concerning Tithes in *London*, by which the *Mayor* of *London* must be first addressed to, and the Decree mentions only the Parson, Vicar, and Curate, and whether he that is in by sequestration be within it, not being Parson *de jure*, was the question;

tion; and it was urged by the Defendants counsel that he is relievable there, and therefore not here, because he comes in under the Parson's title, and has his lessee. The same law is of an Impropriator, who is not within the words of the Decree, and that so it was lately ruled in Chancery, which the Court agreed to, but yet were divided in this case; and it was afterwards, by consent, referred to compromise.

Michaelmas Term, 9 CAR. 2. A. D. 1657.

SHEFFIELD CLERK *v.* PIERCE and OTHERS.

(Decree Book, 12 Nov.)

Gwillim 503 1 *Wood's Exch.* 38.

THE Bill stated, that by the Judgment of the late *Parliament* of *England*, assembled at *Westminster*, on the 3d November, 1640, the Rectory of *St. Swithin's, in London*, stood sequestered from *Richard Owen*, to the use of *A. Menlius*, an Orthodox Divine, and that he relinquishing the same in the year 1647, it was, by the same Parliament, in the same year, afterwards ordered that the same Rectory should thenceforth stand sequestered to the use of the Plaintiff, and that he should officiate the same and have to his use the Parsonage-house, glebe lands, and all the Tithes, rents, duties, and profits whatsoever of the said Rectory to

Plea of the Statute 37 H. 8. c. 12, s. 19, respecting Tithes in the City of London, to a Bill in Equity for the Tithes of the parish of St. Swithin, over ruled.

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his own use till further order should be taken in the premises; that by virtue of the said Order of Parliament, he entered and officiated in the cure, and performed his duty therein in all things, and ought to have had the Tithes, offerings, profits, and commodities of what kind soever, belonging to the same as Rector and Parson, there as the former ones had heretofore had and received, and enjoyed the same. The Bill then sets forth the Statute and the Decree confirmed by act of Parliament in the 37th *year of H.* 8. touching the payments of Tithes by the Citizens of *London*, after the rate of every 10s. a year rent 1s. 4½d., and for every 20s. the sum of 2s. 9d., and so on; and that the greatest part of his Parishioners have, and still do, continue payment of all kind, of Tithes, offerings, duties and profits to the Plaintiff, or some recompence for the same; but the Defendants have, for five years, refused the payment of the same. The Plaintiff therefore prayed that the Defendants may make a full discovery of the Messuages, &c. they held for the same years, and the yearly rent, and that the Tithes and Duties due for the same, may be decreed to him accordingly.

The Defendants put in a plea and demurrer, setting forth that the Plaintiff entitles himself to the Tithes in question, by an Order of the late *Parliament*, begun and held at *Westminster* in 1640, but makes his title by *Act of Parliament* made in the 37th *year* of H. 8., and of *a decree* made thereupon, and that it was doubtful whether the Plaintiff, coming in by sequestration, be relievable before the *Mayor* of the said *city* of *London*; and therefore the said Defendants, for plea, say, that the said Act of Parliament and Decree, do only provide for the recovery of Tithes in *London*; and that in and by the said Decree it is decreed, "that if any variance, "controversy or strife, did or should arise in the said "city,

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"city, for any payment of Tithes, then upon the complaint by the party grieved, to the Mayor of the said "city, he shall, by advice of counsel, call the parties "before him, and make an end of the same; and if he "should not, within two months after the complaint, "the Lord *Chancellor* of England, within three months "after complaint made to him, should make an end of "it," that the said Plaintiff ought to have pursued the way directed by the said Decree, and that if the Plaintiff be not relievable within the said Decree, by the said Lord *Mayor* of *London*, and Lords Commissioners of the great Seal of *England*, as he said by his said Bill he is, much less could this Court take cognizance or jurisdiction of a case of this nature, whereby to relieve the said Plaintiff.

Upon reading the plea, and hearing counsel on both sides, on the 24th *November*, 1655,

It was ordered, by the Court, that the said plea and demurrer should be over-ruled, and that the said Defendants should answer the said Bill.

The Defendants answered, and denied that they knew that the Plaintiff was ordered to officiate the cure of the said Parish as Rector there, and have the profits, or that he had officiated there; and that if he had any title thereto, they did not conceive him to be entitled to 2s. 9d, in the pound for his Tithes, according to the rents they then paid for their houses, it not being the intent of the said Statute and Decree to pay Tithes according to the improved rents, but according to the old rents as they were before the said Statute; they confessed that they were inhabitants, and set forth the houses, &c. and the rents they paid for the same, and that when the said Plaintiff first came to officiate there, he agreed

The rate ordered by the Statute 37 H. 8. c. 12, s. 2, to be paid on *the Rent* of houses in London in lieu of Tithes is assessable on the improved Rents of such houses.

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to accept of £120 per *annum* with some of the parishioners, in lieu of Tithes and Duties there, which had been constantly paid to him.

The Plaintiff replied—the Defendants rejoined—and witnesses were examined on both sides.

Now, upon full hearing and full debate, and reading the proofs in the cause, and the said order of Parliament begun and held at *Westminster* aforesaid, on the 3d of *November*, 1640, bearing date the 30th of *December*, 1647, it appeareth to the Court that it was ordered, that the said Rectory of *Saint Swithin* should thenceforth stand sequestered to the use of the said Plaintiff, and he to officiate the same, and to have all the Tithes, duties and profits whatsoever of the said Rectory to his own use; and also it appeareth that the said Plaintiff, by virtue of the said order of Parliament, did ever since officiate the said cure, and perform his duty therein in all things, and therefore ought to have had the Tithes, offerings, profits and commodities of what kind soever belonging to the said Rectory, as Rector and Parson there, as the former ones there theretofore had had and received the same; and that the said Defendants had not paid the Tithes due to the Plaintiff, for the several years complained of in the Bill to be behind and unpaid.

And as for the *Composition* pretended to be made between the said *Parishioners* and the said Plaintiff to accept of £120 per *annum* in lieu and satisfaction of all Tithes and Duties, due and payable to him within the said Parish; it appeareth to this Court that the said *Composition* was to continue for the space of *three years* next after the said Plaintiff's coming to officiate there and no longer, and there not being sufficient proof

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proof made on the said Defendants behalf, that the said sum of £120 was paid to the said Plaintiff any longer than the said three first years.

The Court is therefore fully satisfied, for the reasons before alledged, that the Defendants ought to have satisfied and paid their several and respective Tithes due and payable by them to the said Plaintiff for the years aforesaid complained of by the Bill, according to the rate of 2s. 9d. in the pound, for their several houses, shops, warehouses, cellars and sollars which they held within the said parish, according to the several yearly rents which they severally and respectively pay for the same; yet nevertheless, in regard to the said Plaintiff being present in Court, did declare himself willing to accept the several sums heretofore paid by the said Defendants, and mentioned in the Decree, for their several houses, &c. for Tithes, in full satisfaction of all Tithes due and payable to the Plaintiff by the said Defendants, and that the said Defendants shall continue the payment of the same as long as he continues Rector thereof, and they continue Inhabitants within the said parish; and if any difference arise between the said parties, touching the payment of the Tithes, according to the several rates and proportions in the Decree mentioned, it is referred to the Auditor of his Highness's revenue within the City of *London* to cast up the same, upon view and perusal of the said pleadings, and certify to this Court his doings and proceedings therein, with all convenient speed, and that upon return of the said certificate the said Defendants shall thenceforth satisfy and pay to the said Plaintiff, all such sums of money as shall be certified by him to be due to the Plaintiff. And it is ordered, that the said Defendants shall satisfy and pay to the said Plaintiff £10 for his Costs and Charges by him sustained in the said cause.

1658.

EXCHEQUER.

TRINITY TERM, 10 CAR. 2, A. D. 1658.

LANGHAM *v.* BAKER, AND OTHERS, PARISHIONERS OF ST. HELEN'S, LONDON.

(*Hardr.* 116, *Gwill:* 511.)

A Bill lies in the Exchequer for non-payment of Tithes in London, according to the Decree in Stat. 37 H. 8. c. 12.

THE Plaintiff as Farmer of the impropriate Rectory of *St. Helen's, London*, prefers his Bill here against the Defendants for not paying their Tithes in *London*, according to the Decree in Statute 37, *H.* 8, c. 12, to which the Defendants plead the said Decree, and that the Plaintiff hath his remedy before the *Mayor* of *London*, by the Act of Parliament which settles the Decree; and demand judgment whether or no this Court will take cognizance of the matter?

And it was held clearly that the Court had jurisdiction in this cause, for that it appears by the very Decree itself, and the Act of 37 *H.* 8, and by *Lindwood de decimis*, that Tithes were payable in *London* before the said Act for houses, but the *quota* was doubtful, which is remedied by the said Act and Decree; and the Act has no negative words; it is not said "before the *Mayor* of *London* and not elsewhere." See *Skidmore's* case (*a*), *Co. Mag. Chart.* upon 2 *E.* 6. and Tithes were determinable here *ab antiquo*, as appears by 38 *Ass. Selden de decimis* 4 *E.* 4. and by *Articuli Cleri c.* 4. In the case of the *King* and his Farmers the cause follows the person, and his privilege; and

(*a*) ante, 36.

this

this case is not to be resembled to cases where Justices of Peace are empowered by Act of Parliament; and for that cause Justices of *Oyer* and *Terminer* have nothing to do, nor Justices of Goal Delivery; and so *vice versa* 11 *Rep.* Doctor *Forster's* case; for they have but a limited jurisdiction; and the King's Farmer has, in respect of the revenue the same personal privilege that the King has: and, without question, the King may sue here, and it was ruled that the Defendants *answer over*.

1693.

LANGHAM v. BAKER.

EXCHEQUER.

EASTER TERM. W. AND M. A. D. 1693. Scae.

WARD AND OTHERS v. HILDER.

Decree Book 18 *May.*—*Gwillim* 538. 1 *Wood Exch.* 305.

THE Bill stated that *Queen Elizabeth* being seized in fee in right of the *Crown of England* of the impropriate Rectory and Church of *Saint Lawrence Poultney* in the City of *London*, and of the *Vicarage* of the said Church, and of all Tithes, customary payments in lieu of tithes, lands and hereditaments thereunto belonging, by her *Letters Patent*, dated the 12*th day of March, in the thirty-third year of her reign*, granted to *E. Downing and R. Rant*, the said Rectory with the

The Statute 37 H. 8. c. 12 for regulating the payment of Tithes in London extends both to Lay Impropriate and Spiritual Persons, but the Parsons, Vicars

Statute 22 and 23 Car. 2. c. 15. for the maintenance of and Curates in those Parishes, which were destroyed by the Fire of London, extends to Preaching Ministers only.

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the rights and appurtenances thereof, and the advowson thereof, and all the lands, Tithes and profits to the said rectory and vicarage belonging. To hold to them, their heirs and assigns, under a fee-farm rent of £4: 6s. 9d. *a year;* that the title and interest of, and in the said rectory, vicarage, Tithes and premises were by two mesne conveyances come to and vested in the Plaintiffs, who then were, and for several years past had been duly entitled to, and ought to have and enjoy all Tithes, rates and customary payments, in lieu of Tithes, whether due by custom or common right, or according to the Decree made in the 37 *H.* 8. for the payment of Tithes in *London*, and all dues and profits to the said Rectory and Vicarage belonging; that anciently and time whereof the memory of man is not to the contrary, or by other good right and title, there had been due and payable, and till of late had been paid, and of right ought still to be paid, by the owners and proprietors of the said Rectory and Vicarage, their Farmers and Lessees, for or in lieu, or in the name of Tithes, out of and for the Ground whereon, at the time of filing the Bill, a large Dwelling House was then standing within the said Parish, which then was, and for three years then last past and upwards, had been in the Defendant's occupation, and out of and for a Yard and Wharf, adjoining or belonging to the said House, which was during the time aforesaid held by the Defendant, the yearly sum of £1: 16s. or such like yearly sum by four quarterly payments, or in some other manner; that the said sum had been in arrear for three years ended the 25*th March*, 1692, and ought have been paid to the Plaintiffs, or the said Defendant ought to have paid to the Plaintiffs for the premises, according to the said Decree, for every 10s. rent by the year 1s. 4½d, and for every 20s. rent by the year 2s. 9d., and so above the rate

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rate of 20s. by the year, ascending from 10s. to 20s., or the Defendant ought to have paid some other rate or customary payment for, or in the name of Tithes for the premises in his own possession, for the said three years past, being of the yearly value of £60 and upwards; that the Defendant taking advantage of the houses and buildings which formerly stood on the ground in question, having been burnt down in the year 1666, and of the present Buildings being on new foundations, pretended that no Tithes or Rates for Tithes are payable for the premises, or if any, yet that 2s. 9d in the pound was not payable, but some other rate. The Bill therefore prayed that the Defendant might discover what Houses, Wharfs and Grounds he had been possessed of within the said Parish for the said three years, and the yearly value thereof, and be compelled to pay the accustomed rates and might set forth what was due for oblations.

The Defendant said that he knew nothing of the said Letters Patent, or of the Decree aforesaid, nor upon what account the Plaintiffs could demand Tithes he confessed he had been an Inhabitant in the said Parish for nine years, and still was a Housekeeper there, and that for some of the said years he had paid £1: 16s. rated and assessed upon him for the Dwelling House, Shop and Ground, for or in lieu of Tithes, Oblations and other Ecclesiastical Duties, but for how many years he remembered not, that after he had lived some time in the said Parish, he found he was over-rated, and refused to pay the same, he also confessed, that his House was worth £40 *per annum*, and that as he was over-rated he had not paid any Tithes for the same, for the time in the Bill mentioned.

The Plaintiffs replied; the Defendant rejoined, and

Winesses

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Witnesses were examined, and after reading the said Grant from Queen *Elizabeth* and several mesne conveyances, the Defendant's Counsel insisted that the Stat. 37 *H.* 8. *c.* 12. extends only to Spiritual Issues, and not to Impropriators, and that by the Statute 22nd and 23d *C.* 2. *c.* 15. a new method is prescribed, for the recovery and payments of Tithes and Duties within the several Parishes demolished by the great Fire in London, in the year 1666.

But the Court was of opinion, that the 37 *H.* 8. *c.* 12. extends as well to lay Impropriators as to Spiritual persons, and that the 22d and 23d *C.* 2. *c.* 15. extends not to Impropriators and their rights, but was passed for the maintenance of Preaching Ministers, and therefore that the said Defendant is chargeable with and after the rate of 2s. 9d. in the pound, unless he can make it appear that there is some ancient or customary rate or payment in lieu of Tithes.

The Plaintiffs in this Case submitted to accept the said Rate of £1 : 16s. per annum, formerly paid for the House and Premises in question, which appeared to be of the yearly value of £40; if the Defendant (as he had formerly done) would continue to pay the same, which he being present in Court, refused to do.

It was therefore ordered and decreed, that the Defendant should pay to the Plaintiffs, or their assigns, the arrears of the Tithes of the said House and Premises in his occupation, for the three years in the Bill mentioned, ended 25th March 1692, at 2s. 9d. in the pound, rent or value of and for his said House and Premises, the same to be rated and valued at and after the rate of £30 *per annum*, for the yearly rent or value of the said House and Premises during the said

said three years, which the Plaintiffs submitted to accept, though proved of a greater value in the Cause; which arrears being computed in Court did amount yearly to £4: 2s. 6d. and for the whole three years ended the 25th March 1692 did amount to £12: 7s. 6d. according to the said Decree, made in 37 *H.* 8. for the payment of Tithes in London, which sum the said Defendant was thereby ordered and decreed forthwith to pay to the Plaintiffs or their assigns.

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EXCHEQUER.

MICH. TERM, W. AND M. A. D. 1693.

GRANT *v.* CANNON.

Diene Book, 20 *Nov.*—*Gwillim*, 541.

THE Plaintiff being seized in fee of and in the impropriate Rectory of *Saint Dunstan's in the West*, within the City of *London*, and County of *Middlesex*; and the Hamlets thereto belonging, claimed Tithes by virtue of the *Stat.* 37 *H.* 8. *c.* 13.

The Red Hart Inn, in Fetter Lane, is within the City of London, and not within the Liberty of the Rolls.

The Defendant confessed that he was Owner of the *Red Hart Inn*, in *Fetter Lane*, but denied that any part thereof was in the *City* of *London*, and said that the same is within the Liberty of the *Rolls*, which liberty is exempt from the payment of Tithes, He confessed that he held the said Inn, and let the other Tenements.

On

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On Debate of the Matter and reading the Depositions taken on behalf of the Plaintiffs, whereby it plainly appeared, that the Premises in question in the Defendant's occupation, were within the liberty of the City of *London*, the Court was of opinion that the Defendant ought to pay after the rate of 2s. 9d. in the pound, according to the Statute 37 *H. c.* 13.

EXCHEQUER.

TRINITY TERM, 6 W. AND M. A. D. 1694.

GRANT v. BROWN AND ANOTHER.

Decree Book, 20 *Nov.*—*Gwillim*, 544.

White Friars is within the Liberty of the City of London, and was so when the 37 H. 8. c. 2. was passed, but it was not within that part of the parish of St. Dunstan in the West, which is in the City of London.

THE Plaintiff stated that *Mrs. Jevan*, at her death, in the year 1691, and for twenty-five years before, was seized in fee of the Parsonage and Rectory of *Saint Dunstan in the West*, in the City of *London*, in the County of *Middlesex*, and entitled to Tithes, &c. That she made her Will in *September* 1691 and devised the said Rectory to the Plaintiff and made him sole Executor; that he proved the said Will, and was legally entitled to the said impropriation, and to all arrears of Tithes due in her lifetime; that the *Statute* 37 *H.* 8. *c.* 2. enacts "that the Citizens and Inhabitants of the City of *London* should yearly, without fraud, pay of every 10s. rent of all houses, shops, cellars, &c. 1s. 4d½., and for every 20s. the sum of 2s. 9d. that the Defendants were for several years, in the lifetime of *Mrs. Jevan*, and also since Tenants, Inhabitants, and

and Occupiers of several houses, shops, and cellars, within that part of the Parish that is within the City of *London*. The Bill therefore prayed to have an account of what Houses the defendants severally held, what time they had occupied the same, and what rents they had paid for the same.

The Defendants set forth and specified the particular houses by them occupied, and the rents and value of the same, and insisted that all the houses were situate in the Precinct called *White Friars*; that the said Precinct was no part of the City of *London*, at the time of making the Decree and Act of Parliament, in 37 *H.* 8., but that the same was made part of the liberty of the City of *London* by the late *King James the First*, and subjected to the Jurisdiction thereof by grants and letters patent, and therefore the said Act and Decree did not extend to or concern the Defendants. They also insisted that the Precinct of *White Friars* was not within the Parish of *Saint Dunstan in the West*, or the rectory or tithable places thereof, and denied that any rate or *modus* for the Tithe was ever payable or paid by them to the Parson of the said Parish.

The Plaintiff replied, the Defendants rejoined, and Witnesses were examined on both sides, and upon reading several Depositions as also copies of several Ancient Records and Grants from the Crown, a Trial at Law was directed to be had before the *Chief Baron (i)* upon these two Issues, viz.

First. Whether the Precinct of *White Friars* was

(*i*) The Cause was tried before Mr. Baron *Lechmere*, the office of Chief Baron being at that time vacant.

within

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within the Liberty of the City of *London*, at the time when the Act was made in 35 *H.* 8.

Secondly. Whether the Precinct of *White Friars* be within the Parish of *Saint Dunstan in the West.*

The Issues were accordingly tried, and the one Issue found for the Plaintiff, and the other for the Defendants, but a new Trial upon the said Issues was ordered on Payment of Costs to the Defendants, on which Trial, before a Special Jury, it was found upon the first Issue "that *White Friars* was within *London* "at the time the Statute was made," but upon the second Issue, "that the Precinct of *White Friars* was "not within the Parish of *Saint Dunstan in the West.*"

The cause came on to be further heard on the 3d of June 1604, when upon reading the said Orders and postea, and hearing Counsel for the Defendants, It was Ordered, that all the Defendants should be absolutely dismissed from the said Bill; but before the said Order was entered, the Plaintiff's Counsel, on the 8th of June instant, alledging the Cause was brought on sooner than expected, it was ordered to come on this day; and on full debate it is ordered by the Court, that the said Bill be and is hereby dismissed.

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Trinity Term, 6 W. & M. A. D. 1694.

SAYER *v.* MUMFORD and OTHERS,

(*Gwillim*, 546.)

The Plaintiff as Lessee under *Baliol College* in *Oxford*, claims from the Defendants 2*s*. 9*d*. in the pound on their respective Rents, in lieu of Tithes, pursuant to the Statute 37 H, 8. c. 12.

THE Bill stated, that the *Master* and *Scholars* of *Baliol College* in *Oxford*, are seized in fee of the Rectory or Parsonage impropriate of *Saint Lawrence Jewry*, in the City of *London*, and entitled to all Tithes, oblations, ecclesiastical duties and all customary and other payments in lieu of Tithes within the said Parish; that being so seized they by Indenture dated the 26th *March* 1692, demised all and singular the said Tithes, and other ecclesiastical duties and payments, to the Plaintiff for 21 years under the yearly rent of £40 7*s*. payable, viz. to the *Master* and *Scholars*, £20 7*s*. a year, and to the *Vicar* of the Church £20. a year; by virtue of which Lease he is entitled to have the said Tithes and other ecclesiastical duties for a year and upwards, or else such payments in lieu of Tithes as are by custom or common right or by the Decree made in 37 *H*. 8. due to him; that time out of mind there hath been paid by the Parishioners, Inhabitants, and occupiers of Houses and other Tithable matters within the said Parish, to the Proprietors of the said Rectory, a customary pound rate for or in lieu of Tithes, or else, according to the said Decree for every 10*s*. rent, 1*s*. 4½*d*. *per Annum*, and for every 20*s*. rent, 2*s*. 9*d*. *per Annum*, and so above that rent according to the said rate; that the Defendants or some other of the Parishioners have for 60 years or upwards, been Lessees of the said Rectory, under the said *Master* and *Scholars*,

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lars, during which time great alterations were made in the Buildings within the said Parish, by reason of the great Fire; so that the Plaintiffs cannot discover what the ancient Tithes were, or of whom to demand the same, and they having gotten into their hands all the ancient books, terriers, and writings, relating to the said Tithes, do deny to pay the Plaintiff any Tithes or any customary or other payments, in lieu of Tithes, according to the aforesaid Decree of 2*s*. 9*d*. in the pound. The Bill therefore prayed that the Defendants might discover what houses and other things were Tithable in the said Parish, they were possessors or occupiers of during 1692, and the time they were charged to be in arrear for their Tithes, together with the yearly rents and values thereof, and what customary or other sums of money they have paid for or in lieu of Tithes, or have known to be paid by others, and that they may discover and deliver up the ancient books, &c. and pay the Plaintiff their Tithes or the customary rate pursuant to the Decree.

The Defendants plead the Statute 22 & 23 C. 2. c. 15.

The Defendants by their Answer confessed the Plaintiffs title to the Tithes, but said they did not know of any customary rates for assessments or payments of Tithes, or any sum of money in lieu thereof; or that any oblations, obventions, or other ecclesiastical duties had been paid or were payable, other than in the Assessments annexed to their Answers which were made by the Statute 22 & 23, *C*. 2 c. 15, intituled "An Act "for the better settlement and maintenance of the Par- "sons, Vicars, and Curates, in the Parishes burnt by "the late dreadful fire." And the Defendants set forth the yearly rents of their Houses, and other things in their possessions, and confessed that some of the Inhabitants in trust for the said Parish had been Lesees of the said Tithes, upon several Leases for the time in the Bill mentioned;

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mentioned; the last whereof being made to the Defendants *Caplin and others*, expired at *Lady-day* 1692, and that the Churchwardens had usually collected the said Tithes; and that they are indebted to the Plaintiff for the sum rated in the Assessments upon their Houses, from the end of the said Lease which they were ready to pay.

The Plaintiff replied; the Defendants rejoined but no Witnesses were examined, and upon reading an old book relating to the said Tithes in 1643, and several old books and writings produced by both sides, and on full debate of the matter it was ordered and decreed, (*a*) that the Defendants should respectively account to the Plaintiff, for the Tithes of the several Houses and other Tithable matters in their possession, after the rate of 2*s* 9*d*. for every pound, of the yearly rents or values thereof, from the time the last parish lease expired being at *Lady day* 1692, to the time of exhibiting the said Bill, and it was thereby referred to the *Deputy Remembrancer* to take the said account accordingly.

The Defendants ordered to pay their Tithes pursuant to 37 H 8, c 12.

In pursuance of the said Decree, the *Deputy Remembrancer* made his report, dated the 15th *October* last, and the Cause being in the Paper came on to be heard the 25th of *October* last, when upon reading the Order and report, and hearing Counsel on both sides, it was ordered to stand over for the Court to consider the Costs.

Upon the 6th of *November* instant, on an application by the Defendant's Counsel, and on reading a petition for a re-hearing, and the Plaintiff's Counsel opposing the same, it was ordered, that the Cause should be

A Re-hearing granted.

(*a*) by *Turton* and *Powell*, Barons.

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re-heard this day, and that the Defendants should pay £5. Costs for the re-hearing, together with £3. Costs for the last days attendance.

The former decree confirmed.

On the 15th *November* 1694, upon hearing Counsel, and on reading the said Act of Parliament, made in the 22d & 23rd *Car.* 2, and also on reading the Report and on full debate, it was ordered and decreed by the Lord Chancellor (*a*) and the Barons (*b*), that the former Decree and that also the Report, should be and were thereby ratified and confirmed, and that the said Defendants respectively pay to the said Plaintiff, the several sums reported due from them with the Plaintiff's Costs to be taxed

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MICH. TERM, 6 W. & M. A.D. 1694, Seac.

UMFREVILLE *v.* BATCHELOR and OTHERS.

(*Gwillim*, 548.)

Titles decreed to the personal Representative of the Impropriator, for Houses in London, at 2s. 9d. in the pound.

THE Plaintiff as Executrix of the last Will and Testament of her late Husband deceased, did in *Trinity Term*, in the 22 *Car.* 2. exhibit her Bill against the Defendants to have 2*s.* 9*d.* in the pound for Tithes

(*a*) *Montague*, Chancellor.

(*b*) *Nich. Lechmere, John Turton*, and

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due in the lifetime of her Husband, he being owner and impropriator of the Parish of Saint *Botolph Without Aldgate*, part of which Parish lies within the Liberties of the City of *London*, and the other part in the County of *Middlesex*, and the Defendant *Batchelor* being occupier of several houses within that part of the Parish which lieth within the Liberty of the City of *London*.

The Defendant by his Answer, stated that for the time demanded by the Bill he had been occupier of one house in *Rose* and *Crown Court*, in *Houndsditch*, and of another house in *Covent Garden*, otherwise called *Gravel Lane*, within that part of the Parish which lieth within the Liberty of the *City of London*.

The Plaintiff replied; the Defendant rejoined and Witnesses were examined on the part of the Plaintiff, and upon opening the Bill, and reading an Affidavit of the service of Subpœna to hear Judgment, and reading the Answer, and no Counsel appearing for the Defendant, the Court (*a*) ordered that the Defendant should satisfy the Plaintiff **2*s*. 9*d*.** in the pound, according to the 37th *H.* 8. c. 12, for the house in *Rose* and *Crown Court*, in *Houndsditch*, and in *Covent Garden* otherwise *Gravel Lane*, in that part of the said parish of *St. Botolph Aldgate*, which lieth within the Liberties of the City of *London*, for the time demanded by the Bill.

...ag... ...ncellor. *Lechmere*, Baron.

1694.

EASTER TERM, 6 W. and M. 1694.

UMFREVILLE *v.* TOPPING, and OTHERS.

(*Gwill. in notis*, 893.)

Bill for Tithes for premises in that part of the Parish of St Botolph Aldgate, which lies in the County of Middlesex.

THE Bill demanded Tithes or customary payments in lieu thereof for certain premises in that part of the Parish of *St. Botolph Without Aldgate*, which lies in the County of *Middlesex*, to which Bill the Defendants answered, and the Plaintiff, by a special replication, relinquished all Tithes and Dues antecedent to the 13th *September* 1688. The Defendants rejoined, and Witnesses were examined, and upon reading the Depositions and the ancient Tithe Books of the Parish, the Court decreed the Defendants *Topping* and *Hart*, to pay 2*s*. 6*d*. a quarter, in lieu of the Tithe of their Houses, and also *Easter Offerings* for themselves and their families.

The Defendants *Davenport* and *Webb*, to pay 2*s*. a quarter, the Defendant *Jones*, £1. 5*s*. a quarter, for his House in *King Harry Yard*, and as to the Defendant *Middleton*, the Court directed an Issue to try before the Chief *Baron*, and a *Special Jury*, "whether there is a *modus* of 20*s*. a year, or another "*modus* of £20. a year, or any, and what other "*modus* or *modusses* exceeding 20*s*. a year for the "Houses called *Hooker's Rents*, of which the Defend-"ant's House was one on the *North side of Sun Yard*." And that if upon the Trial the Jury should find that there is no other *modus* than 20*s*. a year for *Hooker's Rents*, the Court will consider of costs for the Defendant

fendant *Middleton*, for the said Trial. The Cause came on to be further heard on the 14th *May* 1694, when the *Deputy Remembrancer*, was ordered to take an Account as against the Defendants *Grosse*, *Ratcliffe*, *Welbeck*, *Turner*, *Herne*, *Chetwin*, *Kendal*, *Smith*, and others, according to the different rates mentioned for their several Tenements in the Parish.

1694. 7 May. UMFREVILLE v. TOPPING.

On the 22nd *May* 1694, a Decree *nisi* agains *Holbeck*, *Turner*, *Kendal*, and *Chetwin*, was made absolute, and on the 5th *July* following, the *Deputy Remembrancer's* Report was ratified and confirmed, but it does not appear from the Book of Decrees and orders, that any proceedings were had upon the issue.

7 JULY, 1705.

TOWNLEY *v.* WILSON,

(*Gwillim in notis*, 635.)

THIS was a bill filed by the Lessee of the *Dean and Chapter of Westminster* (who was an Attorney) to enforce from the Inhabitants of the Parish of *St. Bride's* in *London*, payment of Tithes, according to the rates decreed by the Statute, 37 *H.* 8 c. 12. The Defendants pleaded that an ancient rate had been uninterruptedly paid in the said Parish, until in the *Year* 1666, when the said parish, excepting a few houses, was burnt down by the fire of *London*, that afterwards the Statute 22 & 23 *Car.* 2. c. 15. directed that the Impropriators of the destroyed parishes, should pay to the respective incumbents, the same monies, as had been usually paid to them before the said fire; that *sixty pounds* a year had been usually paid to the *Vicar* of *St. Bride's*; that

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that in the year 1675 there was a general assessment made on the said Parish both for Tithes to the Impropriators, and the augmented Tithes to the Vicar, by which the Vicar's maintenance was increased to *one hundred and twenty pounds a year*, and that the said assessment had been constantly adhered to and observed, and the Defendants, after setting forth the said rates made in 1675, and the annual rents of their respective houses, insisted that they were only liable to pay the said rates in lieu of Tithes. The several ancient books or rentals of the Tithes of the said Parish, from 1639 to 1676, were read in evidence: But the Court decreed, that the Defendants should pay after the rate of 2*s*. 9*d*. in the pound, on the yearly rents of the houses, shops, warehouses, and cellars, pursuant to the Statute 37 *H*. 8 c. 12. From this decree the Defendants appealed to the House of Lords, stating however a somewhat weaker case than that which they had insisted upon in the Answer to the House.

The following Cases delivered to the House are taken from the Lambeth Library, Tennison, MS. DCXL. 80.—*Gwil.* 635, *in notis are as follows*:

They stated that they were occupiers of several houses, &c. in *St. Bride's* parish, the Rectory whereof is impropriate and belonging to the *Dean and Chapter of Westminster*. That by an Act of Parliament and Decree therein mentioned, made in the 37 *Hen*. 8, it is enacted and decreed, that the Citizens and Inhabitants of the *City of London* and the *Liberties thereof* should pay of every 10*s*. rent by the year, of all houses, shops, warehouses, cellars, and stables, 1*s*. 4½*d*. *per Annum*, and of every 20*s*. rent, 2*s*. 9*d*., and so above the rent of 20*s*. by the year, which Act may reasonably be presumed either to have been repealed,

or

or not thought fit to be put in execution, for that no parish in *London* pay 2*s*. 9*d*. for every 20*s*. of the improved rents for the Tithes of their houses. That if the said Act and Decree were not repealed but was still in force, yet there is a proviso in the said Decree contained, that where a less sum than 2*s*. 9*d*. in the 20*s*. rent had been accustomed to be paid for the Tithes. That then in such places the Citizens and Inhabitants of *London* and the *Liberties* of the same, shall pay but after such rate as hath been accustomed. That 2*s*. 9*d*. according to the improved yearly value of the houses, shops, &c in the said parish, was never paid in the parish for the Tithes thereof, and above the sum of 3*d*. *per pound*, was never paid by the Inhabitants or any of them, to the *Dean and Chapter of Westminster*, their lessees or farmers, or any of them, for or in lieu of Tithes of houses, shops, &c. in the said parish, nor was there ever till very lately any greater sum demanded by them for the same, which in all probability, would have been done, had there been so great a sum as 2*s*. 9*d*. in the pound due and payable.

That by an Act of Parliament made in the 22nd and 23rd *years* of the Reign of the late *King Charles* 2. c. 15. (*a*) reciting Whereas the Tithes in the City of London, were levied and paid with great inequality, and are since the late dreadful fire there, in the rebuilding of the same, by taking away some houses, altering the foundation of many, and the new erection of others, so disordered that, in case they should not, for the time to come, be reduced to a certainty, many controversies and suits at law might thence arise, it was enacted, that the annual certain Tithe of all parishes in the said City and Liberties thereof, the churches of which had been demolished, or in part consumed by

(*a*) ante, 13.

the

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the late fire, should be as followeth, (that is to say) the annual certain Tithes, or money in lieu of Tithes of the said parish of *St. Brides*, £120, and the Tithes of other the said parishes in the said City and Liberties, the churches of which were demolished, or in part consumed, were reduced to a certain annual sum. That by the said fire all the houses in the said parish, except some few were consumed, and in the rebuilding of the said parish great alterations and confusions were made, by reason that several streets were enlarged for the public good by the laying of several houses into the said streets, and in the building of others in other places where none were before, and by reason of rebuilding of some houses of some of the inhabitants upon part only of the ground where formerly others stood, whereof the Appellant *Wilson's* house was one. That, as humbly conceived, the Tithes of the said parish being reduced by the said Act of 22d & 23 *Car.* 2. to a certain annual sum all former Tithes and payments ceased from that time, and the Statute and Decree in 37 *Hen.* 8 if they were in force before, yet, as to the parishes mentioned in the said Act of *King Charles the 2nd*, are thereby repealed. That by reason of the said fire it might be reasonably presumed, that several parish books and other evidences were lost, whereby the certain annual sums payable in the said parish in lieu of Tithes might have certainly appeared, and for the reasons aforesaid, it might equitably and reasonably be presumed, that at the making of the said Statute of 37 *Hen.* 8, and long before, there were some constant payments in lieu of Tithes within the said parish, which were less than 2*s.* 9*d.* in the pound, of the improved rent, though the same with the utmost strictness and exactness required by the rules of law, could not then be made out, and if so then by the aforesaid proviso in the said decree, made in the 37 *Hen.* 8. the inhabitants were only to pay according to the rates then accustomed.

accustomed. That before the said fire the said *Dean and Chapter*, as Impropriators as aforesaid, were at the sole charge of a preaching or officiating Minister in the said parish of *St. Bride's*, yet by the said Act of 22 & 23 *Car.* 2, the inhabitants of the said parish are charged with the payment of £60. *per Annum*, to the said preaching or officiating Minister, which was as much as the said impropriators are by the said Act to pay, which it was very probable the makers of that law would not have done, had they conceived the inhabitants of the said parish, were liable to the payment of 2*s.* 9*d.* in the pound according to the improved yearly value of their houses, shops, &c. All which notwithstanding the Respondent Lessee of the said Rectory, under the said *Dean and Chapter of Westminster*, at the *yearly rent of* £113. 6. 8. did lately exhibit his bill in the Court of *Exchequer*, against the Appellants, to compel them to pay for and in lieu of the Tithes of their houses, shops, &c. after the rate of 2s. 9*d.* for every pound of the full improved yearly rents or values thereof, and obtained a decree in the same Court, under colour and pretence of the said Act and Decree made in the said 37th *year of Hen.* 8. That the public rates, taxes, and payments, within the said parish, amounted to above 7*s.* *per Annum* in the pound, besides the said 2s. 9*d.* which sum of 2*s.* 9*d.* (the yearly value of the said parish as it is rated to the *Land tax*, being above £18000. *per Annum*), would amount to above £2475. *per Annum*, which exceeds the yearly value of most *Bishopricks* in *England*, and which sum of 2*s.* 9*d* in the pound if it should be exacted, would be the utter ruin of many poor people of the said parish, and tend to the depopulation thereof, and that there was a great reason to believe, if this Decree stands confirmed, the Respondent would exact the said 2*s.* 9*d.* in the pound, for that he had served above 500 of the inhabitants with *subpœnae* to com-

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pel them to pay 2*s*. 9*d*. in the pound, by the year, for their Tithes according to the improved yearly value of their houses, shops, &c.; 200 whereof at the least were served with *subpœnas* since the appeal had been depending in the house, and amongst them were the Appellants *Thomas Wilson* and *Geo. Parker*.

The Respondent on the other hand stated, that the *Dean and Chapter of Westminster*, had theretofore made several leases of the Tithes of the said parish, to several persons in trust for the parish, that the parish being so entitled to the Tithes, made such rates and assessments from time to time upon one another as they thought fit. And when by the Act for rebuilding *London*, the *Vicar* of *St. Bride's* maintenance was settled at £120. *per Annum*, (whereof the *Dean and Chapter* pay yearly of their money £60. *per Annum*, by way of *augmentation*) the parish who ought to have paid the other £60. *per Annum*, made a rate upon the Tithes for the same, and charged the Tithes with the yearly payment thereof, that the inhabitants being called upon from time to time to renew their lease, neglected and at last refused so to do, unless they could have a lease on their own terms, in regard they had held the Tithes so long that they thought no person could find out or discover the same; that the old lease being expired, and the parish refusing to renew, the Dean and Chapter, made a lease for 21 *years* to the Respondent *Townly*, on the 24th *April*, 1705, in consideration of £600. and £113 6*s*. 8*d*. *rent per Annum*, whereof £60. *per Annum*, is for the augmentation of the *Vicar* of *St. Bride's*, towards his maintenance, that the Respondent, after he had obtained his lease, staid a whole year soliciting the parishioners to pay their Tithes, but could not get one penny, nor would they deliver to him the ancient tithe books and papers belonging to the impropriation; that the Respondent exhibited

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hibited his Bill in the *Exchequer* in *Easter Term*, 1704 against four persons, (who were the Appellants) upon the Statute and Decree, made in the 37th *year of King Henry the* 8th, for 2*s*. 9*d*. in the pound, being the only law for payment of Tithes in *London*, but instead of paying any monies, a long cross bill was presently exhibited against the Respondent, upon many frivolous and groundless suggestions, on purpose to put the Respondent to all the trouble and charge they could. That on the 10th *May*, 1705, the Respondent's cause came on to be heard, and the Court ordered the cause to stand for the then next Term, to see if the Defendant's would agree the matter in the mean time; but no agreement being made, the Court was further continued till the 17th *July* then *last*, when a Decree was made for the Respondent for his Tithes, after the rate of 2*s*. 9*d*. in the pound, according to the Appellant's answer. That notwithstanding this Decree, the Respondent could not get one penny of money, nor had he received one six-pence throughout the parish, that the parish had yearly taxed the Respondent for his Tithes at £200 *per Annum*, which he had paid (although while the parish had the Tithes they never taxed the same), and he had also constantly paid the reserved rent of £113 6*s*. 8*d*. but had not received any money from the parishioners, that several of the parishioners proposing to agree with the Respondent, such persons were threatened to be loaded with taxes and offices, if they made any agreement, and so would not proceed therein; that the inhabitants had laid and collected a tax through the parish, to raise money to go to law with the Respondent, and declared that unless he would take what they pleased to give him, he should never have any Tithe in the parish; that the Appellants had appealed from the Decree in the *Exchequer*, under pretence there was no such Decree, or Act of Parliament for payment of Tithes in *London*, or that a less sum in the pound was payable

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payable for the same. Whereas the said Decree and *Act of Parliament* of the *37 Hen.* 8. are in the printed Statute Book, always allowed, and many Decrees successively from time to time, grounded upon the same, there being no other rule or law for the Impropriators Tithes in *London*, where there are not ancient *moduses*; nor had the Appellant's any pretence of *moduses*, all their books by them produced being from time to time according to the rate of *2s. 9d.* per pound rent, and there also are different rates or sums, whereas a *modus* must always be the same sum without variation.

The appeal was brought into the House, on the 13th *November* 1705; on the 30th the Respondent moved that a short day might be appointed for the hearing of the Appeal, and that the Appellants might be ordered to produce three paper books they had produced in the Court of *Exchequer*. The 11th *December*, was accordingly appointed for the hearing, which was afterwards by an order of the 7th *of December*, postponed till the 8th *January*, in the hopes of an accommodation; however, on that day the Counsel for both parties were heard, and the *Lord Keeper* was ordered to make his report to the House of what the Counsel had offered on the 22nd *of that month*, which time was afterwards enlarged to the 1st *of February*. But the judgment of the House upon the Case was never had, for after the argument by Counsel the parties agreed to submit themselves to the *arbitration of the Archbishop of Canterbury*, *Lord Somers*, and *Lord Halifax*, and their award, it should seem, was afterwards ratified by Parliament, for an Act passed this Session fixing the impropriate Tithes of this Parish at £400. *per Annum* clear of all deductions, and directing the Respondent to be paid at that rate for his arrears. Vide Statute *4 Ann*, c. 2.

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TRINITY TERM, 1719.

Gwillim 633. *Gilb.* 191. 2 *Br. P. C.* 437. 8 *Vin.* 568.

THE plaintiff became Vicar of the Parish of *St. Giles Without, Cripplegate*, in April, 1817, and in Trinity term, 1719, he exhibited his Bill in the Court of *Exchequer* against the defendants, as occupiers of houses within the said parish, for tithes after the rate of 2*s.* 9*d.* in the pound, according to the yearly rent of their respective houses, and grounded his demand upon the statute and of 37 *Hen. VIII. c.* 12.

The defendants by their answer to this Bill, admitted, that during the time therein mentioned they had respectively occupied houses within the said parish, (viz.) the defendant *Trepass*, a house of the yearly value of £12, the defendant *Bocket*, a house of the yearly value of £16, and the defendant *Witchell*, two houses of the yearly value of £22. But they insisted that no such demand was ever made as 2*s.* 9*d.* in the pound by any former Vicar of the parish, nor was the same ever heard of within the parish till the plaintiff became Vicar, which was but two years before the commencement of the suit: and they further insisted, that they were exempt from such payment after the rate of 2*s.* 9*d.* in the pound, either by virtue of a proviso in the said Statute and Decree, whereby it was provided and decreed, "That were a less sum than after the rate of 6½*d.* "in the 10*s.* rent, or less than 2*s.* 9*d.* in the 20*s.* rent "hath been accustomed to be paid for Tithes, that then "in such places the citizens and inhabitants shall pay only

On a Bill brought for Tithes of houses in *London* after the rate of 2*s.* 9*d.* in the 20*s.* rent according to the Stat. 37. Hen. VIII. c. 12. the Court of Exchequer directed an Issue to try whether any less sum or sums of money than such customary payments, set up by the defendants had ever been paid, and that too, though there was no proof of any regular *modus*. *Gilb. Eq. Rep.* 191. 8 *Vin. Abr.* 568. *pl.* 31 *Bumb.* 106. *pl.* 166. *Gilb. Eq. R.*

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"only after such rate as hath been accustomed," or by some other lawful ways or means.

The cause being at issue, and witnesses examined, was heard on the 27th of *October*, 1620, and there being no proof that the 2*s.* 9*d.* was ever paid or demanded within the said parish, till by the plaintiff's Bill, and some doubts arising concerning the same, the Court directed that a case as it appeared upon the evidence should be stated and settled by counsel on both sides, which was accordingly done to the effect following, viz.

That there was no proof in the cause whether the houses in question were, or any of them was, in lease at the time of making the said Act or not, or that the sum of 2*s.* 9*d.* in the pound was at any time paid according to the value of the houses, by virtue of the Statute and Decree of 37 *Hen. VIII.* but it was proved by some of the plaintiff's witnesses, in their cross examination on the part of the defendants that, till the time of the present Vicar they never heard of any such demand as 2*s.* 9*d.* in the pound for Tithes within the said parish. That in two ancient Tithe-books there appeared to be charged for Tithes, against the names of the then occupiers of *Trepass's* house, the several sums of 5*s.* and 3*s.* 4*d.*; and in another ancient Tithe-book, the several sums of 5*s.* and 3*s.* 4*d.* and 2*s.* 6*d.* which last mentioned sums of 3*s.* 4*d.* and 2*s.* 6*d.* were proved to be the collector's hand-writing, but the 5*s.* charged against *Trepass's* house was of another hand-writing; and in another book, the several sums of 3*s.* 4*d.* and 2*s.* 4*d.* were so charged and proved to be of the collector's hand-writing, and that no certain sum annually, or *modus*, in relation to *Trepass's* house was proved to have been paid but as aforesaid. That in another

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another Tithe-book, commencing in the year 1708 and ending in the year 1713, *Bocket's* house was charged 1*s.* 6*d.* and *Witchell's* house 1*s.* each quarterly. It was proved by one *Surety* that for nine years during the time *Bishop Fowler* was Vicar of the parish, he, the said *Surety*, lived in *Trepass's* house, and during that time never paid more to the Vicar than 10*s.* a year, 2*s.* 6*d.* a quarter; therefore the question on the said case was, whether 2*s.* 9*d.* in the pound of the yearly rents of the said defendants respective houses was due for Tithes by virtue of the said Statute and Decree of 37th *Hen. VIII.* or not.

This case was twice argued by counsel on both sides; first, on 18th *April*, 1722, and afterwards, on 26th *October* following.

For the plaintiff it was argued that the sum of 2*s.* 9*d.* in the pound ought to be paid by the Decree on the Statute of 37th *Hen. VIII.* c. 12. and they looked upon that Statute to be the general law of Tithing in the city, and that if the defendant could not set up a *modus* or composition whereby it appeared that they paid less, that this rule of Tithing ought to take place. And they made several objections to this *modus* set up by the defendants; as,

Gilb. Eq. Rep. 219.

1st. That it was not proved to be time out of mind, and nothing less than an immemorial custom ought to be a bar against a common right.

2nd. It was not set out that the *modus* was paid annually, or half-yearly, and if the particular time of the payment of a *modus* be not set out, the *modus* is not well pleaded, nor is it a good bar; and the reason is, because the original agreement must be certain that

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the person may know when and what to demand, but here there was no time set forth in this *modus*, and therefore it could be no good bar, nor was the *modus* tendered to the plaintiff.

In this case, they quoted for the plaintiff a Decree in the 16th *Jac. I.* (*a*) wherein the Court had decreed 2*s.* 9*d.* in the pound; and likewise the case of *St. Swithin's, Sheffield*, v. Serejant, (*b*) in *Michaelmas, Term*, 1657. and likewise the case of *Umfreville and Plumstead, Term*, 27. c. 2. Grant v. Cannon, *Mich. Term*, 5. Will. and Mary, (*c*) Sir Patience Ward and others v. Hilder, 5 Will. and Mary, (*d*) Sayer v. Munford, *Mich. Term*, 6 Will. and Mary, (*e*) and Townly v. Wilson, 7th July, 1705, (*f*) in all which cases the Court had decreed the sum of 2*s.* 9*d.* in the pound, according to the said Statute and Decree.

And Mr. *Baron Price* who was of opinion for the plaintiff, said the Statute was thought to be in derogation of the rights of the clergy; for it appears by *Linwood* 201, and by *Stow*, that the laity used to pay one halfpenny in the pound to the clergy upon every Sunday and holiday, which came to a greater sum than 2*s.* 9*d.* viz. 3*s.* 5*d.* in the pound.

But it was resolved by the three judges that the case upon this Statute was not like a *modus;* for the Decree in the Statute is, that all houses within the *City of London* and *Liberties*, shall pay 2*s.* 9*d.* for every 20*s.* rent, and then comes the provision in *Sect.* 18. "Pro- "vided also, and it is decreed, that were a less sum "than 2*s.* 9*d.* in the 20*s.* rent has been accustomed to "be paid for Tithes, that then in such places the said

(*a*) Ivatt v Warren ante, 88. (*b*) Ante, 696. (*c*) Ante, 107. (*d*) Ante, 103. (*e*) Ante, 111. (*f*) Ante, 117.

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" citizens and inhabitants shall pay but only after such " rate as has been accustomed."

Now they said it was plain by the Statute itself, and by the citation before-mentioned in *Linwood*, that in many places in the city there had been a custom to pay Tithes according to the pound rate; and these the Statute never intended to alter or enlarge, but to establish, for the Statute was not designed in destruction of any settled right; nay, they took it farther, that if there had been a payment of less sums by agreement between the parson and parishioners they were confirmed by the Statute; because it was the design of the Statute to settle such customary payments, and it was the design of it that they should not be unravelled on either side, and accordingly such customary payments and agreements have been complied with ever since the Statute, and that less sums have been paid by almost every parishioner to the parson, and therewith they have been content; and although several Decrees have been made in this Court for payment of 2*s.* 9*d.* in the pound, yet no customary payments in any parish have been set aside or broken through; but these matters have been compounded between the parties, and the manner of Tithing has continued the same in each parish, except in such parishes as are otherwise regulated by the Statute 22nd. *Car.* II. *c.* 15.

They said, that *Sect.* 18. was a perfect exception of all those that had paid less sums out of the Decree, and therefore this could not be urged as a *modus*, or set up in bar of Tithes, for Tithes were originally due, and therefore the bar must be complete, but there are no Tithes of houses due of common right, for they are none

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none of those things that *renovant in annum*, and therefore the common law (which follows the *Levitical* pattern) did not make them titheable, and therefore they are titheable only by custom of agreement, where there have been such customs and agreements.

The new rate of 2*s.* 9*d.* in the pound was superinduced by the Decree; and it is a strange thing to say, that the Decree was in prejudice of the clergy, when it appears that less sums are now constantly paid for houses in the city, than what would be paid if they were rated under the Decree.

And note, it appears the ancient payment in lieu of Tithes of houses in *London* was somewhat less than 2*s.* 9*d.* in the pound.

But it plainly appears, that before the dissolution of monasteries a great deal of service in *London* was performed by the regular priests, who not only said their masses, but visited the sick, and performed offices of devotion in many parts of the *City*, and when they were extirpated, the duty fell upon the parochial clergy, and then it was necessary that their maintenance should be increased, and therefore this Decree was made that all persons should pay the received rents from houses, (that is) where there had been accustomed payments the Tithes were to be continued payable according to that custom; and where there was no immemorial custom, yet if there had been by agreement, &c. a payment for eight years past, this according to the frame of the Statute is to be looked upon as customary payment; for the divisions and severances of the houses, wharfs, and warehouses, were to be as they had been for eight years past: so that the construction seems to be, that if there had been an agreement to pay tithes for

for eight years past, they were accustomed payments within the Statutes, and this will appear from a uniform notion that if there were Tithes by custom or by agreement for eight years past they are within *Sect.* 18 of that Statute.

But there were no such accustomed payments, there the Statute is introductive of a new law, and lays the charge upon all the other to pay 2*s.* 9*d.* in the pound.

As to the objection that there was no particular time of payment alleged, *Baron Page* said that the Statute by *Sect.* 11. hath appointed the payment of Tithes quarterly, and therefore it need not be set out in the Bill as the authorized time of payment.

But it seems doubtful whether that proviso extends any farther than to the 2*s.* 9*d.* mentioned in the Decree, and not to the accustomed payments mentioned in *Sect.* 18 of the Act.

But in this all the three judges agreed that they were not obliged to set up those customary payments as a *modus* in bar of Tithes, for these customary payments are exemptions of the Decree; and, therefore, in what manner soever they have been paid, if there has been a customary payment since the Statute of a less sum they cannot be bound by the Decree to pay 2*s.* 9*d.* in the pound.

Now if all that pay less sums be exempted from payment under the Decree, and are not within the Decree, nor within the obligation of the Statute, we ought to try whether there be such accustomed payments or not, especially since in this case it appears by the books of the parson that less sums were collected, and it could

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could not have been presumed that they would have been collected in that manner, if they had not been old accustomed payments, for how could those sums have come into the parson's books if they had not been the old accustomed dues?

And the difference of the payments in the books may be reconciled by supposing some of them to be quarterly, some half-yearly payments.

This case relates to the inheritance, and the inheritance is to be bound by our Decree, and where the inheritance is charged merely by custom, it is usual and just, if the parties desire it, to try such custom at law.

Bunb. 143. upon motion that the plaintiff should produce at the trial the books of the former rector, it was objected that these were properly private books, and the plaintiff's own evidence; but as they had been before produced at the hearing of the cause, and as the issue to be tried was to inform the conscience of the Court, the Jury ought to have all the light the Court can give them, and therefore the plaintiff was ordered to produce these books at the trial.

The court conceiving some doubt in relation to these payments, ordered that it should be referred to a trial at law, upon this issue, (viz.) whether any, and what sum or sums less than 2*s.* 9*d.* in the 20*s.* rent had been accustomably paid by the defendants for Tithes, for the houses in possession of the defendants, or any and which of them, although no proof, that there had been any regular *modus*.

In this case were quoted 2 *Inst.* 660. *Noy*, 130. *Hardr.* 116. *Watson*, 387 to 399. *Cro. Car.* 596. *Yelv.* 31. *Moor.* 912. 11 *Co.* 15. *Grant's case*, *Littl. Rep.* 102. 141. *Degge*, 351. *Hob.* 11.

From this decretal order, the plaintiff appealed to the House of Lords. *(a)*

(a) It is said, that this case being a matter of great consequence, the Court of Exchequer took time to consider of

HOUSE OF LORDS.

2 BRO. P. C. 437.

THOMAS BENNETT, Doctor in Divinity, Vicar of St. Giles, Cripplegate, London, } Appellant.

MICHAEL TREPASS, RICHARD BOCKET, and NICHOLAS WITCHELL, Parishioners of the said Parish, } Respondents.

7th MARCH, 1822.

THE respondents, by their answer to this Bill, admitted that during the time therein mentioned they had respectively occupied houses within the said parish, viz. the respondent *Trepass*, a house of the yearly value of £12.; the respondent *Bocket*, a house of the yearly value of £16; and the respondent *Witchell*, two houses of the yearly value of £22; but they insisted that no such demand was ever made as 2*s.* 9*d.* in the pound by any former Vicar of the parish; nor was the same ever heard of within the parish till the appellant became Vicar, which was but two years before the commencement of the suit. And they further insisted that they were exempt from such payments after the rate of 2*s.* 9*d.* in the pound, either by virtue of a proviso in the said Statute and Decree, whereby it was provided and decreed, "that where

Ca. 69. Lord's Journal vol. 22. p. 109. Gilb. Rep. 191. Viner Vol. 8. p. 568. *note* Ca. 3.

their decree, *Bunb.* 107. and it appears that this same cause came before the Barons seven different times in various shapes, viz. in Trinity Term, 1719, 2 *Brown*, 437, *pl.* 69. *Oct.* 27, 1738. 2 *Brown*, 438, *Feb.* 22. 8. *Vin. Ab.* 568. *pl.* 3 *n. April* 18. 2 *Brown*, 439, *April* 26. *Bunb.* 106. *pl.* 166, *and October* 26. 2 *Brown.* 437. *pl.* 69. *Id.* 439. *Bunb.* 107. all in the year 1622; as also on *January* 31, 1723, *Bunb.* 143. *pl.* 223, and in Michaelmas Term, 12 *Geo. I.* 1726. *Gilb. Eq. Rep.* 191. besides the hearing on the appral.

less

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less sum than after the rate of sixteen-pence half-penny in the ten shillings rent, or less sum than 2*s.* 9*d.* in the 20*s.* rent hath been accustomed to be paid for Tithes, that then, in such places, the said citizens and inhabitants shall pay only after such rate as has been accustomed," or by some other lawful ways and means.

The cause being at issue, and witnesses examined, was heard on the 27th of *October*, 1720, and there being no proof that the 2*s.* 9*d.* was ever paid or demanded within the parish, till by the appellant's Bill, and some doubt arising concerning the same, the Court directed that a case, as it appeared upon the evidence should be stated and settled by counsel on both sides, which was accordingly done to the effect following, viz.

That there was no proof in the cause whether the houses in question were, or any of them was, in lease at the time of making the said Act or not; or that the sum of 2*s.* 9*d.* in the pound was at any time paid, according to the value of the houses by virtue of the Statute and Decree of the 37th Hen. VIII. but it was proved by some of the appellant's witnesses in their cross examinations on the part of the defendants, that till the time of the present Vicar they never heard of any such demand as 2*s* 9*d.* in the pound for Tithes within the said parish. That in two ancient Tithe books there appeared to be charged for Tithes, against the names of the then occupiers of *Trepass's* house, the several sums of 5*s.* and 3*s.* 4*d.*; and in another ancient Tithe book, the several sums of 5*s.* 3*s.* 4*d.* and 2*s.* 6*d.* which last-mentioned sums of 3*s.* 4*d.* and 2*s.* 6*d.* were proved to be of the collector's hand-writing, but the 5*s.* charged against *Trepass's* house, was of another hand-writing; and in another book, the

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the several sums of 3*s.* 4*d.* and 2*s.* 6*d.* were so charged and proved to be of the collector's hand-writing; and that no certain sum annually or modus in relation to *Trepass's* house, was proved to have been paid as aforesaid;—that in another Tithe book, commencing in the year 1708, and ending in the year 1713, *Bowkett's* house was charged 1*s.* 6*d.* and *Witchell's* houses 1*s.* each quarterly. It was proved by one *Suretys* that for nine years during the time Bishop *Fowler* was Vicar of the parish, he the said *Suretys* lived in *Trepass's* house, and during that time never paid more to the Vicar than 10*s.* per annum, or 2*s.* 6*d.* per quarter; therefore the question on the said case was, whether 2*s.* 9*d.* in the pound of the yearly rents of the said defendants respective houses was due for Tithes by virtue of the said Statute and Decree of 37th *Hen. VIII.* or not.

This case was twice argued by counsel on both sides; first, on the 18th of *April*, 1722, and afterwards, on the 26th of *October* following, but the Court conceiving some doubt in relation to these payments, ordered that it should be referred to a trial at law upon this issue, viz. "whether any, and what sum or sums less than "2*s.* 9*d.* in the pound had been accustomably paid for "any, and which of the houses in possession of the "respondents, or any, and which of them."

From this order the plantiff appealed, insisting that no issue whatever ought to have been directed, because there could be no occasion to send these facts to be tried by a jury which had already been settled and agreed to by the consent of both parties in the above case; and that with so much care and deliberation as to take up fifteen months in preparing the same, to the appellant's great delay and prejudice. That it appeared

C. Phipps.
E. Eden.

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peared from the answer of the respondents that there was no customary rate in that part of the parish of *Cripplegate*, which lies within the City of *London*, the respondent, *Trepass*, pretended payment being after the rate of about 12*d.* in the pound; and *Bockett's* and *Witchell's* at the rate of about 4*d.* in the pound, and no more; and for this reason also it was apprehended an issue was unnecessary. That the respondents had not given the least colorable proof of any modus or customary payment whatsoever, so as to bring them within the proviso of the Act of Parliament, nothing more being proved than that between the years 1708 and 1713, *Bockett's* house had been charged with 1*s.* 6*d.* and *Witchell's* houses with 1*s.* each; and as to *Trepass's* house, that different sums had formerly been paid, viz. 3*s.* 4*d.* and 2*s.* 6*d.* That the respondents ought not in this case to have been admitted to read their proofs to support such pretended customary rates, because they had not fixed or alleged any time when the same was payable; and by the constant practice of the Court of Exchequer, a *modus* is held to be void where no time is alleged or appointed for the payment of it. That the neglect of the appellant's predecessors to demand according to the Statute, could be no prejudice to a right, vested by the express words of the Statute, which was made to regulate and establish an immemorial custom of paying Tithes in *London*, and therefore it was hoped that the Decree would be reversed, and that the appellant should have an account from the respondents, according to the Statute; since he must either have that or nothing, there being no proof of any customary rate payable for the respondents' houses sufficient to ground a demand upon.

N. Fazarkerly. C. Talbot.

On the other side it was said to be usual for Courts of Equity to direct trials, where matters of fact ap-

peared doubtful; especially if such facts depend upon custom and usage, which are matters most proper to be determined by a jury. That the constant acceptance of lesser sums than 2*s.* 9*d.* in the pound was apprehended to be sufficient to induce the Court to direct such an issue as they had done, as it could not be presumed that the Vicars of the parish would so long have accepted of such lesser payments, if 2*s.* 9*d.* had been due to them; because the same would make the living £3000 per annum more than it is now worth, being only about £800 per annum. That as it appeared that lesser sums than 2*s.* 9*d.* in the pound had been paid for the respondent's houses respectively, it was a strong evidence of an accustomed payment; and especially in this case where the full sum of 2*s.* 9*d.* had never in any single instance been paid, nor was there any evidence that contradicted the payment of these lesser sums, or proved any variation in these payments. And as to the objection made by the appellant, that the direction of the trial would be the occasion of great delay and expence to him, it was said that the contrary was true, for that a trial might have been had, and a final decree made in less time, and at less expense than what was occasioned by the present appeal. But it was manifest that the avoiding either expense or delay had been very little in the appellant's view, there being a clause in the aforesaid Statute or Decree, " that if any variance, controversy, " or strife, do or shall arise within the said City for " non-payment of Tithes, &c. or if any other doubt " arise upon any other thing contained within the " said Decree, that then upon complaint made by the " party grieved to the Mayor of the City of *London*, " for the time being, the said Mayor, by the advice of " counsel, shall call the said parties before him, and " make a final end in the same, with costs to be awarded

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"awarded by the discretion of the said Mayor and his "assistants;" which method, if the appellant had thought fit to have taken, the matters in question might have been long since determined at a very easy expense; and therefore it was hoped that the order would be affirmed, and the appeal dismissed with costs.

Order affirmed Gilb. Eq. Rep. 194. Bunb. 107.

Accordingly, after hearing counsel on this appeal, it was ordered and adjudged that the same should be dismissed, and the order therein complained of affirmed.

The following note is subjoined to the appellant's case.

The appellant humbly hopes he is sufficiently authorized in affirming that this right was vested in the *Clergy of London* by the immemorial custom of that City, antecedent to the Statute. It appearing in the case of *Dr. Dunn*, related in *Sir H. Calthorp's Reports* fol. 62. (*a*) from the records of *London*, there referred to, and from several books of great antiquity, that in 13 *Hen. III.* there was an ancient custom which had then been used time out of mind, that provision should be made for the ministry of *London* in this manner, viz. That he which paid 20*s.* for his house should offer every Sunday and every Apostle's day, whereof the evening was fasted, an halfpenny, and he that paid but 10*s.* rent yearly should offer but one farthing, which amounted to 2*s.* 6*d.* in the pound in the whole year, there being then besides the fifty-two Sundays, eight Apostle's days, the vigils whereof were fasted, and no more, which payment continued till 13 *Rich. II.* about which time the clergy beginning to insist on offerings to be paid on twenty-two Saints' days more, it then amounted to 3*s.* 3*d.* in the pound yearly. And, in 36 *Hen. VI.* there was a composition

(*a*) Ante, 44.

between

between the citizens of *London* and the ministers, that this payment should be made according to that rate. But disputes afterwards arising there was a submission to the *Lord Chancellor*, and divers others of the privy council, and they made an order for payment of Tithes according to the rate of 2*s.* 9*d.* in the pound, which was first promulgated by proclamation, and afterwards established by Act of Parliament, 27 *Hen.* 8. *c.* 21. There was another Order or Decree made to the same purpose with some additions, and confirmed by Act of Parliament 37 *Hen.* 8. *c.* 12. which is the Act on which the appellant now founds his demands.

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EXCHEQUER.

27 GEO. III. A. D. 1787.

1787.

BRAMSTON v. HERON.

BRAMSTON v. HERON, AND OTHERS.

Gwillim, 1314.

THIS was a Bill by the Lessee of the Rectory of St. Botolph Aldersgate, London, under the Dean and Chapter of Westminster, against the defendants, occupiers of houses, within the Parish, for Tithes, according to the Statute and Decree of 37th *Hen. VIII.* that is, for every 10*s.* rent 16½*d.* for every 20*s.* rent 2*s.* 9*d.* above from £10. 10*s.* according to the rate aforesaid. The defendants set up different payments and exemptions. *Heron* insisted that he was not liable to pay any Tithes; first, because he said the plaintiff's title was on the custom

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custom only, and not on the Decree, which had never been followed; secondly, because he occupied a new built house, one of five houses built on a spot where old houses and warehouses stood which never did pay any Tithes. He insisted also on the want of jurisdiction in the Court, the power of determining all controversies respecting the payment of Tithes being reserved by the Act to the Mayor. *Fleet*, another of the defendants, stated, that he occupied a new built house, and that no Tithe is due, because built on the ground where old shops stood. *Underwood*, another defendant, stated a payment of 10*s.* a year, his house being a new house built on the scite of five old houses; the other defendants stated most of them several ancient payments, and those who stated such payments offered by their answers to make them. The plaintiff shortly after the answers had come in amended his Bill, and offered to take in some instances the sums stated by some of the defendants, but varying the sums with respect to others of them as to all the other defendants, however, he prayed that they might be decreed to pay according to the Statute and Decree of *Hen. VIII.*

Lord C. B.—The plaintiff has a primâ facie title, the burthen of proof is on the defendants. As to *Heron*, he has said, that there is no title under the Decree, and if he had proved a customary payment generally through the parish, to be sure he would have made out his assertion, but he has not done so. He has next said, that his house is a new house built on the scite of two old houses and buildings which have never paid Tithes, and his proof of this has gone back for thirty years last past, and if that could be shaped into a defence on the general non-payment he must succeed.

But it was properly urged, that admitting it to be true, that it was built on the scite of two old houses, this

this would be no defence; unless, that it had been shewn that a less rate had been paid; for an exemption will not do. This a Mansion House rent. The first part of the Decree makes it general, and it is a rational mode of Tithing. That all houses were intended is evident from the clause which directs that dwelling houses converted into warehouses, &c. and warehouses, &c. converted into dwelling houses, shall still pay as mansion houses; and also from the exemption in favor of noblemen's houses, and the halls of companies. As to the clause in exemption of detached sheds, &c. this is not an exemption in favor of the land: for buildings, not the land, are the subject of the Act, and we think the privilege not extended to the building when altered to another thing. *Heron* therefore cannot defend himself by non-payment for thirty years, but the Decree must be against him without costs. As to all the other defendants, except *Underwood* and *Fleet*, the Decree must be against them for the sums claimed by the plaintiff with costs. As to *Underwood*, he insists upon an old rate because he occupies a new house built on the site of five old ones, and if new I should have held it applicable to general payments not particular ones. But I am of opinion that the fact is here not made out, the payment being only for twelve years, and a very large one too. Nor can I agree that eight years constitutes a customary payment within the true meaning of the Act, for the only clause which mentions eight years is that which respects the conversion of houses into shops, &c. There must be a Decree therefore against him, and that with costs, and the same against *Fleet*.

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EXPARTE CROXALL.

IN CHANCERY.

20 GEO. III. A. D. 1748.

EX-PARTE CROXALL, Minister of the United Parishes of St. Mary Somerset, and St. Mary Mountshaw.

3 Atk. 639.—*Gwill.* 811.

If the *Lord Mayor* has done wrong in refusing his warrant of Distress for levying sums of money on the Inhabitants who denied the Minister his due, according to the assessment made in the year 1681, under the Act of Parliament passed 22 & 23 *Car.* 2. *c.* 15, for the better settling the maintenance of the Parsons, &c. in the Parishes of the City of London burnt by the fire, in this case the Court of Chancery, upon petition, can issue their warrant for levying the sums assessed.

THE petition prayed that the *Lord Chancellor* would issue his warrant for levying the sums of money mentioned in the petition on several Inhabitants of these Parishes, who had refused to pay the Minister his dues according to an assessment in 1681.

It depended upon the construction of the Statute of 22 & 23 *Car.* 2. c. 15.

The question was, whether the Great Seal has an authority under this Act to issue such Warrant as is prayed; if the *Lord Mayor*, upon application to him, refuses to issue one.

The counsel for the petitioner, in support of the authority of the Great Seal, cited the Case "Exparte *Savage*, Rector of the United Parishes of *St. Andrew Wardrobe*, and *St. Ann's, Blackfriars*, and Exparte Wood, Rector of *St. Michael Royal*, and *St. Martin Vintry*," which came on before *Lord Harcourt*, on petition 29th *October*, 1713, setting forth, "That the Petitioners had respectively demanded of the Inhabitants the respective rates and arrears for the houses, &c. in their respective occupations, but they refused to pay the same; and that the Petitioners applied to *Sir Richard Hoare, Lord Mayor*, for such warrants as the Act of Parliament directed him to grant for levying the said monies, and he refused to grant such warrants; wherefore it was prayed, that his Lordship would grant the Petitioners his warrant to levy the several sums of money

so

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so respectively due to them by distress and sale of such goods of the parties so refusing to pay, according to the directions of the Act of Parliament."

Lord Harcourt thinking the matter of the Petition of great consequence to the Inhabitants of the several Parishes mentioned in the Act, as well as to the *Clergy* of the *City of London*, as no such complaint since the making of the Act had been before made to the *Lord Chancellor*, or *Lord Keeper* of the Great Seal, or to any two of the *Barons* of the *Exchequer*, desired the assistance of Mr. *Baron Bury* and *Mr. Baron Price;* and on 2nd December following, the matter came on again in their presence, when it appeared that several of the quarterly sums claimed by the Petitioners became due, and in arrear, when the houses or other hereditaments whereon such quarterly sums were assessed stood empty, or were in the possession of former tenants or occupiers thereof, and a question thereupon arising, whether such sums so assessed upon the several houses within the several Parishes mentioned in the Act, for making up certain annual sums of money to be paid in lieu of Tithes, were become a fixed or real charge upon the houses whereon they had been so assessed, so that the arrears which became due in the time of former tenants, or when the houses were empty, might be levied on the succeeding tenants; the further consideration of the petitions was adjourned to the 23rd December, upon which day the two *Barons* certified their opinion, "That by the Statute, the sums of money "which have been duly, according to the directions of "the Act assessed upon the several houses, &c. within "the Parishes in the Act, are become real charges upon "the houses, &c. whereon they were so assessed, so that "the arrears which ought to have been paid by the "former occupiers of the houses, or which became due "when the houses stood empty may be levied by dis-"tress and sale of the goods of the present occu-"piers."

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And *Lord Harcourt* declared he entirely concurred in opinion with the *Barons*, and that the Petitioners were at liberty to apply to him for warrants of distress, as prayed by their petition, but directed them first to demand from the several persons mentioned in the petition, the respective sums due from them, that they might have an opportunity of paying them without further trouble or charge.

Lord Chancellor.—The Act of Parliament directs "that the *Alderman* of each respective *Ward* within the *City of Londou*, wherein any of the said Parishes respectively lie, and his *Deputy* or *Deputies*, and the *Common Councilmen* of each respective Ward, with the *Churchwardens* and one or more of the Parishioners of each respective Parish wherein the maintenance is respectively to be assessed, to be nominated by such respective Alderman, Deputy, Common Councilmen, and Churchwardens, or any five of them, whereof the Alderman and his Deputy to be one, shall at some convenient and seasonable time assemble, and meet together at some place within each of the respective Parishes in such respective Ward, wherein the maintenance aforesaid is to be assessed, and they or the major part of them so assembled shall proportionably assess upon houses, all shops, warehouses, and cellars, wharfs, keys, cranes, waterhouses, and tofts of ground, and all other hereditaments whatsoever, the whole respective sum by this Act appointed in the most equal way that the said Assessors according to the best of their judgments can make."

Another provision in this Act is, that if any difference should arise in the assessment, and a Parishioner should find himself aggrieved by the assessing of any sum of money in the manner aforesaid, "That then upon complaint made by the party grieved to the *Lord Mayor* and Court of *Aldermen*, they summoning as well

well the party grieved, as the Alderman and such others as made the assessment, shall hear and determine the same in a summary way, and the judgment by them given shall be final and without appeal."

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After settling the manner of making assessments and no appeals, then comes a clause that directs upon refusal of the Inhabitants of the respective Parishes to pay to the respective incumbents any sum respectively payable, how the same shall be levied.

"That it shall and may be lawful for the *Lord Mayor* of the *City of London* for the time being, upon oath to be made before him of such refusal, to grant a warrant for the officer appointed to collect the same, with the assistance of a constable, in the day time, to levy the same Tithes or sums of money so due and in arrear by distress and sale of the goods of the party so refusing." Section 11.

Then comes the proviso which gives jurisdiction to the Great Seal.

"Provided that in case the *Lord Mayor* or Court of Aldermen shall refuse to execute any of the respective powers to them by this Act granted, or to perform all and every such thing relating either to the assessing or levying of the respective sums aforesaid, that then it shall be lawful for the *Lord Chancellor* or *Lord Keeper* of the Great Seal for the time being, or any two or more of the *Barons* of His Majesty's Court of Exchequer by warrant under his or their respective hands and seals, to do and perform what the said *Lord Mayor* and Court of *Aldermen*, according to the true intent and meaning of this Act might or ought to have done, and by such warrant either to empower any person to make the respective assessments, or to authorize the respective officers appointed to collect the sums aforesaid to levy the same by distress and sale of the goods of any person that shall refuse to pay in manner and form aforesaid." Section 12.

I must

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I must take it here as if the assessment was made, the authority of the Great Seal does not extend to every case under this Act, but only where there has been a refusal by the *Lord Mayor*, &c. to execute the power granted to them, then the *Lord Chancellor*, or &c. for the time being, is to issue a warrant, &c. Here the *Lord Mayor* has heard the parties, and is of opinion not to grant a warrant.

In the one case the Act did not intend to leave the Minister so far in the power of Common Councilmen and Churchwardens as to abide by their determination, but he has his appeal, and it does not only give an appeal to the Minister, but to the Inhabitants, for the words are, " if any variance or difference in the assessment, and a parishioner shall find himself aggrieved, &c. and the *Lord Mayor's* determination is final there."

In the other case, where there is no controversy about the assessment, but a refusal to pay, though the words are, " shall and may be lawful;" yet that is imperative upon the *Lord Mayor*, if a just demand. In case of any variance or difference in the assessment between the Minister and Parishioners, and appeal to the *Lord Mayor*, the *Court of Chancery* or *Exchequer* have no jurisdiction, unless the *Lord Mayor* refuses to take cognizance, because that would be refusing to execute their own power, but if they have entered into the consideration of the grievance in any manner their appeal would be final. In the present case the only act the *Lord Mayor* was to do was to issue a warrant; he has refused it; and, unless I enter into the question, whether the *Lord Mayor* ought to have issued a warrant, I can never judge whether he had a power to do it or no. Here is, as it appears to me, a plain distinction in the Act of Parliament; for this warrant must have been founded upon an assessment; and as to the Parishioners, if the *Lord Mayor* had issued a warrant improperly, an Action of Trespass would have laid against

against him, and that might have been his reason for refusing it.

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Upon the whole, I think the Court has a jurisdiction to inquire, whether the *Lord Mayor* has done right in refusing the warrant; and if of opinion he has done wrong, I can issue my warrant for levying the sums assessed; and his Lordship gave directions accordingly.

There being a dispute whether part of the premises were liable to the assessment, by consent of all parties, the Court referred the decision to Arbitrators.

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1753.

MARCH 2.

Bill for Tithes upon a supposed custom of payment of 1s. in 10s. rent.

M.S.S. Earl of Hardwicke.

BILL by the plaintiff as lay impropriator of the Tithes of *St. Botolph Without, Aldgate*, for Tithes of houses upon a supposed custom of payment of 1*s.* in 10*s.* according to the rent. The defendants deny the custom, and say that a lay impropriator is not within 37 *Henry VIII.*

Mr. Clarke, for the plaintiff, cited *Dr. Grant's* case, and that a lay impropriator was determined to be within 37 *Henry VIII.* by the Commissioners of the Great Seal, assisted by judges in *Bramston* and *Ashley*, and *Bramston v. Cooke*, 7th and *November* 1657, and in two cases cited in that of *Hallams* and *Hallams*, and *Bearcroft* and *Fox*.

It was afterwards objected, that it appears by the books that the Rector has taken less than the demand according to the supposed rate; and given receipts for the whole, which was deceitful only to get evidence, and does not warrant the custom laid.

Lord Chancellor.—I do not think that material; for it is impossible for the Rector to discover the rent of every house; and he must either take what he can get,

or

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or bring bills of discovery against every occupier. And this is the reason that Lord Chief Justice *Holt* held a *Modus* of this kind bad, because the Rector could not know the rents; but it may be good as a customary payment of Tithes here, because it gives the Rector what he is not otherwise entitled to, nor do I think that the custom is to be construed to confine the right to the rents as they stood at the time of the commencement, but to vary as they improve; but all I can do is to direct an issue on the custom laid in the bill. His Lordship directed the trial, and if the plaintiff by such a day waived the issue, the bill to be dismissed; and it was upon such waiver dismissed with costs.

EXCHEQUER.

1st GEO. III. A. D. 1761.

1761.

KYNASTON v. HATTERSLEY.

KYNASTON v. HATTERSLEY.

3 *Woods Decr.* 9. *Gwillim*, 890.

The impropriator of St. Botolph, Without Aldgate, in the county of Middlesex, claims 20*s.* a year from the defendant in lieu of Tithes of a house in East Smithfield.

THE Bill stated that the plaintiff for 28 years past had been seized in fee of the Rectory impropriate of the parish of *St. Botolph, Without Aldgate*, that part thereof was in *London*, in the liberties thereof, and other part in the suburbs of the said city, in the county of *Middlesex*; that he as impropriator thereof was entitled to receive quarterly, for the time aforesaid, all tithes, and rates for tithes, sums of money, customary payments, or other duties, in lieu of tithes and ecclesiastical duties due by custom or common right, or some rate, composition, or satisfaction for the same, and all other dues and profits to the said rectory and parish church, and the impropriation thereof for the time

time being, belonging and payable by the inhabitants, owners, and possessors of any houses, outhouses, shops, cellars, sollars, warehouses, lands and grounds within the parish and the titheable places thereof, within the time aforesaid, as well in such parts of the parish as lie within the city of *London*, and the suburbs of the said city, as in such parts as lie within the county of *Middlesex;* that the defendant for seven years past as well in his own right as in right of other persons whom he represented, had been an inhabitant, owner, lessee, and possessor of a dwelling-house, with the buildings and appurtenances thereto belonging in *East Smithfield*, within the part of the parish which was in *Middlesex*, for which 20s. a year were due in lieu of tithes, that the defendant and the former owners or occupiers thereof had immediately theretofore paid to the plaintiff and his predecessors, or their lessees 20s. yearly for the tithes of the said dwelling-house, stable, and other buildings, as an ancient composition for the tithes of the lands on which the said premises then stood, by yearly, half-yearly, and quarterly payments, from *Christmas*, 1729, to *Lady-day*, 1752, both inclusive, and that the said sums had been paid for the said premises from the year 1666, that the defendant ought to have paid the said annual payment in lieu of Tithes for the said premises, according to custom time out of mind, that he had frequently applied to him for the same, but that he had refused to pay. The Bill further stated, that there had been several Bills filed in this Court by the plaintiff's predecessors against the inhabitants and occupiers of houses and tenements within that part of the parish which was in *Middlesex*, and that they had been decreed to pay certain sums for the Tithes thereof, and he prayed that the defendant might be decreed to pay him for the Tithes, duties, and profits, or the rate or composition in lieu of Tithes, by him owing for his said house, stable, and premises, during the time aforesaid. The

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The defendant says that houses and other buildings are not Tithable of common right, and that there is no custom in that part of *St. Botolph* which lies in *Middlesex*, to pay the Tithes demanded by the Bill.

The defendant admitted, that the plaintiff claimed the Rectory impropriate of the said parish, but denied that to his knowledge he was seized thereof in fee or had any other estate of inheritance therein. He also admitted that he was a Lessee in possession of the house and building, situate in that part of the parish of *St. Botolph* Without, *Aldgate*, which is in the county of *Middlesex*, and had been so during the time mentioned in the Bill, and said that soon after he entered on the premises, the collector of the Tithes for the impropriator came and demanded of him Tithes or a payment after the rate of 20*s.* a year in lieu thereof, alleging that the same was payable to the impropriator for the said premises by virtue of some custom; that he being a stranger had paid the same until the year 1752, but that since that year he had not paid the same or any part thereof; and he insisted that no Tithes, or rates for Tithes, or money in lieu thereof were due or payable for the said premises, for that no Tithes were due for houses or other buildings of common right; and that no custom to pay such Tithes prevailed within that part of the parish of *St. Botolph*, Without *Aldgate*, which lies in *Middlesex*. He also said that the plaintiff, he believed, had exhibited his Bill in *Chancery* in the year 1747 against *Henry Willoughby and others*, (*a*) occupiers of houses within the said parish, setting forth, among other things, that the defendants ought to have paid the plaintiff 1*s.* out of every 18*s.* and 2*s.* out of every 28*s.* yearly, and so in like proportion for every tenement above the rent of 20*s.* ascending from 10*s.* to 18*s.* according to ancient custom time out of mind, used in that part of the parish and rectory which lies in *Middlesex*; that the said defendants denied the custom; that on the hearing of the cause an issue was directed to try the same; that the plaintiff declined proceeding to trial, and that his Bill was

(*a*) Ante, 147.

afterwards

afterwards dismissed with costs; that the plaintiff, he believed, had commenced several other suits against several of the inhabitants, and had thereby intimidated them to pay what he demanded for Tithes; and had frequently given receipts in an unfair manner. And he further insisted, that no Tithes were due for the premises occupied by him, not only for the reasons aforesaid, but because the ground and soil of the said premises, and other parts of the said parish, were, at the dissolution of monasteries in the 31st year of Hen. VIII. part of the possessions of the *Abbey or Monastery of Graces*, dissolved by the Statute 31 Hen. VIII. c. 13. that the said monastery was one of the greater monasteries and of the yearly value of £200; that the same was discharged from the payment of Tithes in respect of the lands belonging to it, and that the lands in the said parish were discharged of Tithes. He denied that he knew of any Decree or proceedings in the Court between the impropriators and inhabitants of the parish, but said that if any Decree had been made, the same was obtained by collusion, and that he, the defendant was not bound thereby.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon hearing counsel, and reading an indenture Tripartite, dated the 12th June, 1728, signed, *J. Raymond and others*, the answer and the schedule annexed to it, the deposition of *Thomas Yewd* which was objected to by the defendant's counsel; his cross examination to the first part of the fifth interrogatory as to other matters in the said fifth interrogatory, when the question objected was overruled;—the Tithe book of the collectors referred to by his deposition which was objected to, and the objection overruled. The deposition of *F. Phipps*, and several entries in the Tithing book, for that part of the

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the Parish of *St. Botolph's, Aldgate*, situate in the County of *Middlesex*, from 1673 to 1753, decrees in this court in Easter Term the 7th of May, and Trinity Term the 5th of July, in the sixth year of *William and Mary*, between *Umfreville v. Topping, (a)* a Decree in *Michaelmas* Term, the 25th of *November* in the same year, *Umfreville v. Campion, (b)* a Decree the 13th of *February*, in the fourteenth and fifteenth years of *Charles* the Second, *Reynell* v. *Coppin*, and upon full debate the Court ordered the defendant to account to the plaintiff for the said sum of 20s. yearly demanded by the Bill, during the time aforesaid, and also to pay him his costs of suit when taxed.

WILLIAMSON v. GOSLING.

IN CHANCERY.

Trinity Term, 2nd GEO. III.—A. D. 1762.

WILLIAMSON v. GOSLING.

Gwillim, 209.

The impropriator *St. Dunstan's* in the *West* claims 2*s.* 9*d.* in the pound for new houses built on the site of old houses which formerly paid composition.

BILL by the plaintiff as devisee and executrix of *Joseph Taylor*, deceased, owner of the impropriate Rectory of *St. Dunstan's in the West*, stating the Statute of 37 *Hen. VIII.* and the Decree, and charging that the defendant *Gosling* had been owner of several decayed houses, for the Tithes of which several pecuniary compositions had been taken, but that the said houses not being inhabited, the defendant pulled them down and built two new houses, for which the defendant ought to have paid Tithes, according to the said Statute, but which they refused.

(*a*) Ante. 116. (*b*) Wood's Decr. 329.

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The defendants insisted upon the proviso in the Act in favor of less payments, and they set up several customary payments in lieu of the Tithes of the four old houses, and contended that the new houses were built on the same scite with the old, and, therefore, that the amount of the said ancient customary payments only was due.

The Court decreed payment according to three of the customary payments set up, and decreed the defendant to account with, and pay to the plaintiff for the Tithes of the premises built on the ground where the house called the *Gentleman and Porter alehouse* once stood, after the rate of 2*s.* 9*d.* in the pound with costs.

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Michaelmas Term. 3rd GEO. III.—A. D. 1762.

KYNASTON v. MILLER.

Gwillim, 903.

BILL filed by the plaintiff as the impropriator of the Rectory of the parish of *St Botolph Without, Aldgate*, praying relief under the Statute of 37th *Hen. VIII.* and the Decree therein mentioned, stating that in manifestation of his right he had some time before filed his Bill in the same Court against *Joseph Watton* and others, for the same ends and purposes as the

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the present Bill, and that the cause was heard on the 23rd of February, 1741, when the Court declared that the plaintiff as impropriator was entitled to Tithes of such premises as were within the City of *London*, according to the said Statute and Decree, and decreed an account accordingly; that the defendants notwithstanding, refused to discover the yearly rents or value of the said houses, or to pay their Tithes; the Bill therefore prayed a discovery and accounts.

The defendants admitted the plaintiff's right as impropriator to all Tithe rates, customary payments, and other duties in lieu thereof, by custom or common right, but knew not whether to any sums in pursuance of the said Statute and Decree. They submitted that the said rights, payable by the said Decree, were substituted in the place of offerings and oblations due to officiating ministers. The defendants claimed an exemption from Tithes, the land where their houses stood being formerly the site of a *Monastery;* and they also contended, that the Suit should have been instituted before the *Lord Mayor of London*, as the plaintiff claimed under the Statute and Decree.

On reading the Decree in *Kynaston and Watton*, and the several exhibits, the *Master of the Rolls* declared that the plantiff as impropriator of the parish of *St. Botolph Without, Aldgate*, was by virtue of the Act of 37 *Hen. VIII.* and the Decree therein mentioned, entitled to payments in the nature of Tithes from the defendants as occupiers of the premises mentioned in the said Act of Parliament, and not comprised within the proviso therein contained: and decreed an acoount accordingly with costs.

EXCHEQUER.

Trinity Term, 14th GEO. III.—1774.

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KYNASTON v. PIERCY.

KYNASTON v. PIERCY.

Gwillim, 1654.

IN this Term there was a Suit by *Mr. Kynaston* as executor of his father, who was impropriator of *St. Botolph Without, Aldgate*, against one *Piercy*, to recover an ancient composition of £20 per annum for the Tithes of two houses in *St. Catherine's Lane, on Little Tower Hill*, and his title being admitted, there was a Decree accordingly.

The impropriator of *St. Botolph Without, Aldgate*, claims a composition of 20*d.* in the pound for houses in *St. Catherine's Lane*, for which he had a decree.

IN CHANCERY.

35 GEO. III. A. D. 1795.

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THE WARDEN AND MINOR CANONS OF ST. PAUL'S v. CRICKETT.

2 *Ves Jun.* 563.—*Gwillim*, 1425.

THE Bill was filed by the Wardens and Minor Canons of *St. Paul's Church, London*, as Parson

Notwithstanding the Statute and Decree 37. *Hen.* VIII. c. 12. the Court of *Chancery* has jurisdiction upon the subject of *Tithe* in *London*. An account was decreed according to the improved rent. Another defendant setting forth his lease at a low rent, and a fine, and alleging by answer that he had never heard of any greater rent being paid, there being no evidence against it, was held liable only, according to that rent.

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and proprietors of the Rectory of the parish of *St. Gregory's* against *Crickett and Griffiths*, and the object of the Bill was to establish the right of the plaintiffs under the Statute and Decree of 37 *Hen.* VIII. *c.* 12. to Tithes in respect of the houses of the defendants at the rate of 2s. 9d. in the pound upon the rent, for which purpose the bill prayed a discovery and account.

The defendant *Crickett* by his answer stated the lease under which he held at a rent of £1 2s. 6d. *per annum*, and a fine of £30. and alleged that he never heard of any greater rent being paid. The defendant *Griffiths* also opposed the demand, but did not allege the rent he paid to be the ancient accustomed rent.

It was objected that the original jurisdiction of this Court was taken away by the 19th and 20th sections of the Decree, directing, that if any variance arise in the City for non-payment of Tithes, or if any doubt arise upon the division of any rent or Tithes, or of any assessment thereof, or upon any other thing contained in this Decree, upon complaint made by the party grieved, the Mayor by the advice of counsel shall call the parties before him, and make a final end, with costs to be awarded by the discretion of the Mayor and his assistants, according to the Decree: but if the Mayor make not an end thereof within two months, or if any of the parties find themselves aggrieved, the *Lord Chancellor* upon complaint to him made within three months next following, shall make an end in the same with costs.

It was alleged, that an application had been made to the Lord Mayor, who declined to interfere in the matter on account of its importance.

Attorney General and *Solicitor General* for the plaintiffs.

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The particular jurisdiction created will not oust the ancient jurisdiction. Courts of Equity have for a considerable time exercised this jurisdiction. *Langham v. Baker* (*a*) is a direct authority, and came on first upon a plea to the jurisdiction. That case was relied on in *Bennet v. Trepass*, (*b*) where the objection was made and over-ruled by the Court of *Exchequer*. In *Grant v. Campbell*, Exch. 5 *Will. and Mary*, an account was decreed.

In *Sayer v. Mumford* (*c*) an account was decreed, and that Decree was affirmed upon a rehearing with costs. The same Decree was made in *Townley v. Wilson*, (*d*) in *Williamson v. Gosling*, (*e*) and in *Kynaston v. Miller*, (*f*) *Sheffield v. Sergeant:* (*g*) the last case was *Bramston v. Heron*. (*h*) It was decreed that the defendants who had proved customary payments of rents should pay Tithes accordingly, and that five others should pay after the rate of 2*s*. 9*d*. in the pound, according to the yearly rent of their houses with costs. These authorities establish the jurisdiction, and also prove that unless an ancient customary payment is made out, the payment is to be according to the improved rent. The intention of the Decree was clearly that the benefit of the improvement should go to the clergyman as any other improvement with regard to Tithes. Upon *Crickett's* answer, the plaintiffs are entitled to an inquiry, whether the rent reserved by the last lease is the rent the premises were let for without covin, previously to that lease.

Mr. *Mansfield* and Mr. *Grant* for the defendants.

(*a*) Ante, 102.
(*b*) Ante, 125. (*c*) Ante, 111. (*d*) Ante, 117. (*e*) Ante, 152. (*f*) Ante, 153. (*g*) Ante, 96. (*h*) Ante, 139.

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In *Skidmore v. Bell* (*a*) it was held that the Statute having given an express jurisdiction, the Ecclesiastical Court had none; there was no jurisdiction in any Court before the Statute. If a Statute creates a new right, the party must be contented with the remedy that Statute gives; it is clear Tithe of houses is not payable by common right. (*b*) *Dr. Grant's* case is the single case in favor of it: it was held there that by custom Tithe of houses may be payable; that a *modus decimandi* can exist of a portion of a fluctuating rent, which is the ground of that decision, is questioned in 1 *Roll. Ab.* 642, and is directly contrary to *Dr. Leyfield's case*, (*c*) and the note in the margin "*nota* "that *modus decimandi* can hardly stand to rise and "fall according to the rent by prescription," shews *Lord Hobart* had not changed his opinion: what was the origin of the custom of paying a certain sum in proportion to the rent of the houses was always disputed. In the reports of special cases collected by *Sir Henry Calthorpe, Recorder in London*, 62, it is stated that by custom the London clergy were provided for by oblations of a halfpenny in the pound every *Sunday* and fast-day; but when they were increased by the Pope, disputes arising, the question was set at rest by the Statute. (*d*) The case in *Hardress* proceeds upon the idea of a common law right. The Court of *Exchequer* assumed that jurisdiction, founded I believe upon their jurisdiction of revenue, but there is no common law right. An original jurisdiction in this Court is inconsistent with their appellate jurisdiction. No case is made for an inquiry. This Statute and 22 and 23 ch. ii. cap. 15, by which an exclusive jurisdiction is created are in *pari materia*. In that *Statute*,

(*a*) Ante, 36. (*b*) Cro. El. 276. (c) 40.
(*d*) 2 Bro. P. c. 440 n. 2 Burn's Ecc. Law, 459.

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Sect. 15, and the *Statute* 22 *ch. ii. c.* 11, by which this parish was united to that of *St. Mary Magdalen*, the rights of the *Warden and Minor Canons of St Paul's* are expressly reserved. It cannot be supposed the legislature intended the income to be large, it probably struck them that these old rates would amount to very little, otherwise it was a gross injustice not to make them contribute to the income of the incumbent. *Griffiths* ought to have an opportunity of inquiring whether the payment they have so long received is not the customary payment.

Reply.—The cases in the Court of *Exchequer* never could have existed on any principle that would not authorise the jurisdiction of this Court. The remedy by application to the Lord Mayor is in relief of the party, if that summary remedy is equal to the case. If the application to this Court had been by petition and they had refused to file affidavits, or in a case of covin, justice could never be obtained without a Bill of discovery. Could it be meant to give an imperfect remedy? An exclusive remedy is given by the Statute of *Charles II.* very properly, the subject being a certain incumbrance to be raised by assessment; it is the ordinary jurisdiction of Justices of Peace in analogous cases. As to *Griffiths*, where the rent was not the ancient accustomed rent, but a varying rent before the Decree; if it arises after the Decree, the plaintiffs are clearly entitled to 2*s.* 9*d.* in the pound upon the rise. There is not in his answer a surmise of an accustomed rate of payment less than the demand, and *Crickett* has offered no proof of the allegation in his answer.

Lord Chancellor.—As to the jurisdiction I am not at liberty to decline it. Upon the principles of law and the authorities it is impossible to allow the objec-

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tion. The decisions cited, and the concurrence of opinion at different times by the judges, are strong authorities, but independent of that I feel the force of the ground taken in the case in *Hardres*, that an Act of Parliament creating a special jurisdiction, never ousts the jurisdiction of *Westminster Hall* without special words. Is there any vestige of an authority to the contrary? How is the Lord Mayor to exercise his jurisdiction upon leases by covin? If it is necessary to consider whether this Court possessed jurisdiction before the Statute of *Henry VIII.* it is not matter of doubt; for take the origin of this right according to the account in *Burn*, which is an accurate historical account, it was a clear ecclesiastical right; it stands exactly therefore upon the same footing as other matters of ecclesiastical cognizance, and this jurisdiction is of necessity; for though the proper jurisdiction is in the spiritual Court, yet that Court may, from its particular form, be unable to execute its own jurisdiction, and then recourse must be had to equity if accounts are necessary; or in cases of fraud if the prosecution of the right depends upon matters of discovery. All those circumstances will lay the jurisdiction, but it is immaterial to consider that question, for I do not admit the argument, that if a Statute creates a new right it creates a new duty. If the performance of that requires the interference of a Court of Equity, the execution of the Statute must of course be with the necessary circumstances.

The case in the second Institute, was an unhandsome struggle for jurisdiction, and the prohibition was, I believe, carried further than in just reason it ought. But I can hardly figure a case in which the Ecclesiastical Court could be able to execute its own jurisdiction, for it must run into customary payments.

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If the jurisdiction is clear, I must then take care that in the exercise of it, and the application to this Court there is no vexation, and particularly because under the Statute recourse may be had to another jurisdiction attended with less expence. As to *Crickett*, he has stated the lease under which he holds the rent he paid, and what he could not put in issue because it is negative that he never heard of any greater rent being paid: there is no sort of evidence of any other having ever been paid from the earliest period. There is not a colour of fraud or covin; what I should naturally do, unless there must be *pro forma* a Decree upon the trifling matter for which he is clearly bound to account, would be to dismiss the Bill as against *Crickett* with costs; but if I was obliged to give a Decree for that miserable sum, I should be still obliged to give him costs.

Griffiths's case is different, he seems misled by attending more to the other case than his own. There is a clear case for a Decree against him, and as he has opposed the plaintiffs upon a ground totally failing, there must be costs against him, unless you will let the cause stand without costs on either side by setting the costs against each other.

The defendant *Crickett*, agreeing to pay the small sum that was clearly due, the Bill was, by consent, dismissed as against him with costs.

May 9.

Lord Chancellor.— Mr. *Dickens* has furnished me with a case in point upon the question of Tithes in the City of London, in which the point of jurisdiction was made by the answer, and *Sir Thomas Clarke* made a Decree for an account of Tithes. (*a*)

(*a*) Kynaston v. Miller Ante, 153..

The defendants by their answer, admitted that they had since the year 1794, occupied and were the owners of several stacks of warehouses and dwelling-houses, for their warehouse keepers and servants, and of waste ground within the parish, but that having built, and being themselves the owners of the said warehouses and dwelling-houses, they never did hold the same, or any part thereof, under any yearly or other rent, or for any consideration in the nature or in lieu of rent, and that no yearly or other rent had at any time been paid for the said warehouses, &c. The defendants further stated their belief that certain dwelling-houses, or some edifices or buildings, were formerly erected, and did stand upon the scite of or upon the same ground on which the defendants warehouses, &c. had been since built, and did then stand, and that some yearly or other rents or payments in the nature of rents were reserved, and made payable for such dwelling-houses, &c. or the ground whereon they stood; but the defendants were unable to set forth what such rents or payments were, or whether they were paid or not, except that the defendants had always understood and believed that such houses, &c. were inhabited and occupied by persons of very low descriptions and necessitous circumstances, and therefore not likely to pay or make good any rents or payments whatever in respect thereof: and that the defendants did not occupy any messuages, &c. in the parish, save as aforesaid.

The case was argued by *Plumer* and *Leach* for the plaintiff; and *Adam*, *Alexander*, and *Wyatt* for the defendants; and the following authorities were cited; *Grant* v. *Cannon*, *(a)* *Ivatt* v. *Warren*, *(b)* *Bramston* v. *Herron*, *(c)* *Williamson* v. *Gostling*, *(d)* *Sayer* v. *Mumford*, *(e)* *Dunn* v. *Burrell and Goffe*, *(f)* and a passage in 2 Inst. 660.

(a) Ante, 107. *(b)* Ante, 88. *(c)* Ante, 139.
(d) Ante, 152. *(e)* Ante, 111. *(f)* Ante, 44.

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Macdonald, Ch. B. delivered the judgment of the Court. These warehouses, it is stated by the answer, were built upon the scite of ancient sheds and some waste grounds, or of some small tenements which probably never paid any rent at all, and which in the absence of all proof of payment must be taken to have never paid any rent. The *East India Company's* defence is founded upon the Statute of 37 *Hen. VIII.* They say, inasmuch as no rent can be found out ever to have been paid for those old tenements, therefore, according to the Act, no criterion is to be found upon which an annual value, or a payment in respect of Tithes can be charged and insisted upon; and, according to the doctrine cited from Lord *Coke's* second Institute, *(a)* that this is a *casus omissus* in the Act, and that therefore there is no ground for enforcing the payment of them. Several cases were cited upon this subject, some of which turned upon an expression which is in the Decree book explained, namely, that they are to pay according to the *rent or value*: on looking into the Decree book it appears that *value* is there a synonymous word with *rent*, because in the reports made by the *Deputy Remembrancer*, and in the schedules to answers in several of these cases, it appears that the *value* was upon the footing of the *rent* then actually payable, therefore there is no distinction between rent and value, for they are used in the same sense. But there are two cases which seem to go home to this point; the first is *Bramston* v. *Heron*. *Bramston*, impropriate Rector, filed his Bill against *Heron;* it appeared that his house was built upon the scite of an old one; he paid the rent of that old house, but claimed an exemption in this way, inasmuch as his house was built on a spot where old houses and warehouses stood, which never did pay any Tithes. The argument appears to have been much the same as that used in the

(a) 2 Inst. 660.

present

present case, but the Court directed that he should pay in respect of that new house, and according to the rent he had stipulated to be paid. There was no occasion to resort to the value in that case, because that happened to be a rent, but it was decreed that it should be paid, and that goes a great way to shew that a new built house should pay according to the value stipulated and agreed between the parties in the shape of rent: but the case of *Williamson v. Gosling*, goes the whole length of this case, for there the claim of the Rector was the same as it is in the present case. The situation of *Sir Francis Gosling's* two houses was as the answer stated, that those two houses of which *Sir Francis Gosling* was the owner, and of one of which he was the occupier, were built upon the scites of four houses, three of which had paid anciently a customary payment: the three houses are distinguished and set forth, and the other house was a public house, known by the sign of the *Gentleman and Porter*, situate separately and behind the other three houses. The answer of *Sir Francis Gosling* is stated in these words, "that the defendants for two years had occupied the two new houses of about the yearly value of £100, and he let the other to another person for the yearly rent of £70," then here is a house built, occupied and owned by *Sir Francis Gosling*, upon the scites of old houses, for one of which no rent could be shewn, but for three of which the rents were shewn, and the Decree of the Court was conformable to this answer, namely, that the value was about £100 a year. The Court decreed that with respect to the houses which stood upon three of the ancient tenements they had made out of their ancient payment, and with respect to the other, the Court decreed "that they should pay 2*s.* 9*d.* in the pound, according to the yearly value of the premises stated in his answer, that the value was about £100

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£100 a year;" which shews that he was calculating the *value*, not speaking of any fixed rent, for the terms are "about the *yearly value* of £100," and that was decreed accordingly. Now compare that with the present case: here is a warehouse upon ground on which stood houses that never had paid any rent; it is precisely the situation of *Sir Francis Gosling's* houses. The case seems to run on all fours with that, and therefore, whatever the Decree in that case was, it must be the same in the present: that upon whatever the annual value is, which is not stated here, the defendants shall pay at the rate of 2*s.* 9*d.* in the pound as in that case; therefore an account must be decreed at that rate, and an enquiry made of what is the real value; and as this is an entangled question which in many instances has distressed the Court, it seems to be a case in which no costs should be given.

From this decree the *East India Company* appealed to the *House* of *Lords*, praying that the same might be reversed for the following reasons.

1st. Because the Decree of the Court of *Exchequer* has declared, that the respondents are entitled to Tithes, after the rate of 2*s.* 9*d.* in the pound upon the annual value of the premises in the pleadings mentioned; although the said Act of Parliment made and passed in the 37th year of King *Hen. VIII.* and the said Decree of the 23d day of *February*, 1545, upon which alone the rights to Tithes of houses in *London* is founded, directs that every owner or inhabitant of dwelling-house, or houses, warehouses, shops, cellars, or stables, inhabiting or occupying the same himself, should pay after the rate of 2*s.* 9*d.* in the pound according to the quantity of such yearly rent, as the same was last letten for, without fraud or covin, although the appellants are the owners of the premises mentioned in the pleadings, and

and occupy the same, and although it does not appear that the same have ever been letten.

2nd. Because the said Act of Parliament and decree of the 23d. day of February, 1545, directed the said Tithe to be calculated after the rate aforesaid upon the yearly rent, and not upon the improved value.

3d. Because the case of an owner inhabiting or occupying himself any dwelling-house, or any houses, warehouses, shops, cellars, or stables, which have never been letten, and for which no rents have been reserved or can be ascertained, is omitted out of the said Act of Parliament.

4th. Because for a great number of years after passing the said Act of Parliament, and making the said Decree of the 23rd February, 1545, rent was considered as the criterion upon which the Tithe of 2*s*. 9*d*. in the pound, of houses, warehouses, shops, cellars, and stables within the City of *London*, was calculated, and no attempt was made on the part of the clergy to enforce the payment of Tithe after the rate aforesaid, upon the value of any houses, warehouses, shops, cellars, or stables, till from lapse of time or inevitable accident, all evidence of the rent for which the same were last letten was lost.

5th. Because the construction put upon the said Act of Parliament and Decree of the 23d *February*, 1545, by the said Court of *Exchequer*, is not consistent with the intent and meaning of the legislature, as it would increase the livings in *London* to a rate far beyond what the legislature could have intended to have provided as the stipends for the parochial clergy, and to an amount exceeding the revenues of many of the high dignitaries of the church.

6th.

1805-6.

KYNASTON v. EAST INDIA COMPANY.

6th. Because the said Act of Parliament and Decree of the 23d. February, 1545, were intended to quiet the animosities, and settle the disputes, which had for several centuries subsisted between the clergy and citizens of *London*, respecting the payment of Tithes; and as this was the object of the legislature, it is a deviation from the intention of Parliament, and is inconsistent with the spirit of the Act and Decree to put a construction upon them which will tend to revive the disputes, and introduce the mischiefs which it was the object of the said Act of Parliament and Decree to prevent.

A. PIGGOTT,
W. ADAM,
J. WYATT.

The respondents submitted, that the Decree ought to be affirmed, and the appeal dismissed with costs, because according to the clear meaning and construction of the Statute 37 *Hen. VIII.* and the Decree of the 23d *February*, 1545, the respondents are entitled to be paid Tithes, or dues in the nature of Tithes, in respect of the premises in question, after the rate and in the manner declared by the Decree of the Court of *Exchequer* pronounced in this cause.

T. PLUMER,
J. LEACH,
C. WETHERELL.

On the 25th *February*, 1813, the House of Lords affirmed the Decree of the Court of Exchequer.

43d GEO. III.—CHANCERY. 1803.

March 1.
Nov. 21.

THE WARDEN AND MINOR CANONS OF ST. PAUL'S, LONDON, v. MORRIS.

MORRIS v. THE WARDEN AND MINOR CANONS OF ST. PAUL'S.

9 *Vesey, Jun.* 155

THE bill in the first of these causes, filed by the Warden and Minor Canons of *St. Paul's* and their lessees, stated their title as parson and proprietors of the church of *St. Gregory*, under letters patent, 24th Hen. VI., to all Tithes, &c. within the said parish; and the Decree, made on the 23d of February, 1545, in pursuance of the Act of Parliament for *Tithes in London* (*a*); by which it was decreed, that the inhabitants

After two trials at bar in favour of the claim of the *Warden* and *Minor Canons* of *St. Paul's* to Tithes at 2s. 9d. under the Decree and Act of parliament, 37 *Hen.* 8. upon an issue, whether any and what less sum had been paid, a new trial was refused; though evidence was rejected, that ought to have been received material, this being in the discretion of the Court for its information; and all the evidence, though proving that less than 2s. 9d. had been paid, not shewing any certain payment in lieu of Tithes.

Whether the issue ought to have been directed in the cross cause. *Query*, 1st. as being upon the bill of mere lessees, not owners: 2d*ly*. as tending to proof of a payment, different from that relied upon by their answer, and the establishment of which was prayed by their bill.

(*a*) Stat. 37 Hen. 8. c. 12.

of

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of London should pay tithes at the rate of 2*s*. 9*d*. in the pound.

The bill also stated the Act of Parliament, 22d Ch. 2. c. 11, for rebuilding the city of *London*, uniting the parishes of *St. Mary Magdalen, Old Fish Street*, and *St. Gregory*, and the Act 22 and 23 Ch. 2. c.16, fixing among others the Tithes of those two parishes at £120: both those Acts saving expressly the right of the plaintiffs, parson and proprietors of the church of *St. Gregory*, to receive all Tithes, &c. within that parish as before; and stating farther a dispute about the payment of that sum of £120. and an order, made by Lord *Shaftesbury* upon petition, directing that sum to be raised upon both parishes, and paid to the incumbent and his successors, the bill prayed an account of the Tithes due from the defendants, occupiers of houses within the parish.

The defendants by their answer set up various payments less than 2s. 9d. in the pound, as customary payments by them respectively, and former occupiers of their respective houses, in lieu of Tithes. They stated, that no information as to the sums paid is to be found among the papers and records of the parish: nor can they in any other manner ascertain or learn the particulars of such payments. In 1763 the last of the leases, which had been usually granted by the *Warden* and *Minor Canons* to the *parish*, was suffered to expire by the parishioners, who refused to renew; insisting that they are not liable to pay the annual sum assessed upon the united parishes under the Statute 22 and 23 *Ch.* 2. for the maintenance of the incumbent, and also to make the accustomed payments to the *Warden* and *Minor Canons*. They insisted, that, if the parishioners were bound to pay Tithes at the rate of 2s. 9d. in the pound, the Tithes would

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would have amounted, during the continuance of the leases so granted to the parish, to an annual sum greatly exceeding the rents reserved, and the fines paid upon renewals: and in 1763 would have amounted to £1,000, and would now amount to upwards of £1,250! and they insist upon the said leases, and upon the said invariable annual sums so paid for the premises, now respectively occupied by the defendants, as clear evidence, that the said decree for Tithes had never any operation of effect in the parish of *St. Gregory*; and that at the time of making the decree the inhabitants of that parish had been accustomed to pay certain ancient and invariable annual sums in lieu of Tithes, less than in the decree specified; and ought not now therefore to be chargeable pursuant to the said decree, or for any other or greater sums for or in lieu of Tithes than the aforesaid accustomed annual payments.

The defendants farther insisted, that the provisions in the two Statutes of *Cha.* 2. reserving to the *Warden* and *Minor Canons* the right to all Tithes, &c. within the parish of *St. Gregory*, were so introduced, in order to obviate all doubts respecting such Tithes under the provisions of the said Acts, by reason that there could be no regular incumbent of the said parish; the church being, under the letters patent, to be served by the Warden or one of the Canons; and the said provisions were not intended to place them in a different situation from the parson and proprietors of other parishes; and particularly, that notwithstanding the proviso in the Act 22 and 23 *Cha.* 2. the *Warden* and *Minor Canons* were bound by that Act to allow out of the ancient accustomed payments to them, in lieu of Tithes towards the assessment made on the parish of *St Gregory*, as its rateable proportion of the sum of £120, settled by the Act for the annual maintenance of the incumbent of the said united parishes, such sum

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They insisted, that, if the parishion
pay Tithes at the rate of 2s. 9d.

instance vary from one or both the said rates; and that in the first or ancient rate there are assessments at 2s. 9d. in the pound, and other assessments divisible at that rate; and at the foot of the last rate or new rate, there is the following note, signed by the churchwardens: "All within this apartment is as it was last rated for the petty canons' tithes from March the 25th, 1676, to March 1677."

The plaintiffs farther charged, that the said two copies furnish complete or very strong presumptive evidence that the payments set up by the defendants were not ancient and invariable payments, but variable; and they farther charge, that the several sums paid by the parishioners themselves, from 1595 to 1763 were assessments made by the parishioners themselves, standing in the situation of lessees of the tithes; and the payment of any less compensation than 2s. 9d. in the pound ought not under the circumstances to prejudice the plaintiffs' claim.

The defendants by their answer to the amended bill, insisted upon the said assessment, stated in the amended bill, entitled, "first or ancient rate," as evidence, that the ancient and accustomed annual payments were according to such rate; and that in those instances where the sums paid differ from said ancient rate, such difference must be taken to have crept in in course of time, from the ignorance of the parties of their ancient rights; and they specified the instances in which the payments now made, correspond precisely with the said ancient rate; and from that correspondence in many instances they believe, that the second or new rate was never submitted to.

The defendants by their cross bill prayed the establishment

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blishment of the ancient and accustomed annual payment for and in lieu of tithes, set up by their answer; and by amendment they adopted the first or ancient rate, according to their farther answer.

An issue was directed by Lord *Loughborough*, to try, generally, whether any, and what, sum, less than 2s. 9d. had been paid. The trial of that issue at the bar of the Court of King's Bench was in favour of the minor canons; not upon the merits, but upon the ground, that the parish books, not being legal evidence, could not be admitted. Another trial, directed by Lord *Loughborough* at the bar of the Court of Exchequer, was also in favour of the minor canons.

Mr. *Mansfield* and Mr. *Leach*, for the defendants in the first cause, moved for a new trial, principally on the ground that evidence was improperly rejected. The evidence objected to was the proceedings in a cause, *Morris* v. *Turner*, in the reign of *Charles* 2. The bill was filed in the Court of Exchequer by Lessees of the Warden and Minor Canons for an account of Tithes under the Statute and Decree. The defendants by their answer insisted, 1st, that there was not a good lease: 2dly. upon payments in lieu of Tithes. The Decree, expressed to be made by consent of the Minor Canons, appearing personally in Court, directed a reference to the Attorney-General; and it did not appear that he made any Award; or that any further proceedings took place.

The *Attorney-General*, Mr. *Richards*, and Mr. *Stanley*, shewed cause against the motion.

Though in the Bishop of *Lincoln* v. *Ellis* (*a*) the

(*a*) Bunb. 119.

Decree

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Decree was admitted as evidence, the admission of the proceedings, if the suit ends in a compromise or reference is a very different question. The proceedings in that cause are not evidence of any general right. The Minor Canons, appearing personally, and not by Attorney, cannot be considered as having appeared to consent: *Bro. Abr.* Tit. *Corporation* (*a*). As a corporation, they can no more be bound than the city of *London* could be bound by the attendance of two or three aldermen. But admitting the evidence, the result is only, that a question as to their right to the 2s. 9d. was depending; and afterwards they did not receive this sum. There would be no ground for a new trial, even at law, much less in equity; where this application is merely to the discretion of the Court. The extent, to which Courts of law have gone in granting new trials, has been to avoid loading the records in small cases with demurrers to evidence and bill of exceptions. Upon an issue there is no instance of either. The issue comes back to the Court, that directed it; whose only object in directing it being to satisfy its own conscience, if satisfied, that justice has been done, though evidence, that ought, according to strict law, to have been received, may have been rejected, that Court will not grant a new trial; which would be merely giving a chance of a verdict against the real justice of the case; and which would lay the Court under the necessity of granting another trial. The issues and the result of it are as much for the satisfaction of the Court, as a reference to the Master and his report. This is only one mode of getting information as to the facts. There are but two cases of exception, in which the Court is bound to direct an issue, the cases of an heir and a rector. In this case it was granted at the instance, not

(*a*) Pl. 28.

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of the minor canons, but of the occupiers. The judge in a Court of Equity has as much right to draw the conclusion from the facts before him as the jury in an action: In *Ligon* v. *Strutt*, (*a*) within the last five years, upon the bill of an impropriate rector, the Court of Exchequer sat eight or nine days, hearing all the evidence from old records; refusing an issue at the instance of the occupier; as not requiring the assistance of a jury upon the evidence; and the decree was for the plaintiff.

There is no instance in a tithe cause of an issue so general as this. The occupier always states a distinct sum as payable. No sum could be ascertained by this answer; and the question before the jury was fairly this, Whether any, and what sum less than 2s. 9d. in the pound was payable? The answer ought to have stated a given sum. The circumstance of not having received tithe in kind is nothing against a rector, unless some particular sum, as a modus, is proved. It is extraordinary, that they should make leases of stipendiary payments; much more, if the fines were unequal.

The LORD CHANCELLOR said, he never knew an instance of such an issue as this; and it would put an end to all the doctrine of Westminster Hall in tithe causes.

Mr. *Mansfield*, in reply, observed, that the issue was framed in the words of that directed in *Bennett* v. *Trepass* (*b*); which was very much considered. He commented upon the enormity of the demand.

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The LORD CHANCELLOR.

Upon the first trial of this issue, in the Court of King's

(*a*) 6 *Ves. Jun*r. 671.
(*b*.) *ante*, 125.

Bench,

Bench, the evidence of the books was rejected; the opinion of the Court being, that they were not at liberty to receive evidence, that was not legal evidence; unless directed by the order of this Court. Upon the new trial, at the bar of the Court of Exchequer, an order was made, that the plaintiffs were to be at liberty to produce the books of the vestry and churchwardens. There was some altercation at the trial, whether this was mandatory or not. The opinion of the Court was, that the *Lord Chancellor* meant, that this evidence should be read; and I think, that was the right construction of that order.

The motion now made for a new trial is made principally upon the ground, that evidence was rejected; and that it is material to the point of fact in issue. This case is perfectly novel in its kind. The answer to the bill of the minor canons is expressed in terms very peculiar and unusual; the defendants all stating different payments, as certain ancient, and invariable annual sums, accustomed to be paid by the inhabitants in lieu of tithes: their cross bill setting up their claim; stating also, that the sums of money expressed in their answer were the accustomed payments and praying, that they may be established. This is the first bill, under which occupiers, not owners, have had a decree for establishing payments in lieu of tithes. They have, however, in this instance had that decree (*a*). The minor canons amended the bill; bringing forward out of their repositories this old book, entitled, "A register of the lands "and tenements belonging to the minor canons;" in which are contained the rates of *St. Gregory's*; sometimes called the first rate and last rate, and sometimes the ancient rate and new rate. Their answer to the

(*a*) Warden and Minor Canons of St. Paul's *v.* Crickett, ante, 155.

cross

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cross bill also disclosed the contents of this book. The defendants to the original bill could not amend their answer. But they put in another answer, varying their defence; and they amended their bill by striking out the payments, the establishment of which they had prayed, and inserted others; making their claim correspond with their new defence. An issue was directed according to that directed in *Bennett* v. *Trepass*; a case, which is nothing like an authority for directing such an issue; for in this case, as understood at the hearing, the defendants had not, as in that, put themselves upon the point, that different sums had been paid at different times; which nevertheless might, as the three judges observe, be aliquot parts of some pound-rent or pound-rate, invariably paid in the parish. The defendants therefore not having staked themselves to any precise payment, the Court directed an issue, whether any, and what less sum had been paid; therefore putting it upon the defendants to shew, that these sums, though varying in appearance, did not vary in fact; as they would not, if *aliquot* parts of that large sum. The three judges, who, with the approbation of the House of Lords, thought that issue ought to be directed, were of that opinion, not in a case, where the record contradicted itself, but upon a record, stating that some larger sum ought to be the pound rate.

The difficulty in this case is, that the issue is directed in the conjoint cause. Suppose, the occupiers may file a bill leaving out the owners, who may file another; I did not recollect a single instance, in which this Court, upon a bill to establish customary payment of any nature, that bill seeking to establish the sum therein specified, has permitted such a plaintiff to try, whether he could avail himself of any other payment. His bill being brought to establish that payment, if he cannot establish

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establish it, the bill ought to be dismissed: or, if he attempted in an issue to set up a payment, for the purpose of supporting his bill, different from that, which it prays to establish, the Court ought to restrain him: and no issue ought to be directed; but, whether the payments stated in the bill are the payments. In the case of tithes, if a man puts himself upon one modus in his defence, and proves another at the hearing, there is a decree against him In *Bennett* v. *Trepass* the issue was consistent with the pleadings. There is nothing in that case, that can be considered an authority for a decree for these defendants if any other payment had been proved.

Defendant to a Bill for Tithes puts himself upon one modus in his defence, and proves another. There must be a decree against him.

The most material exception to this doctrine is, where a plaintiff seeking payments of any species, or tithes in kind, by this evidence introduces doubt, whether he is entitled to make a demand against his common law right. Upon the trial in the Court of *King's Rench* it was thought necessary, but very difficult, to say, what must be paid upon the statute, that is a less sum than 2s. 9d. in the pound was accustomed to be paid; and the person asserting, that a less sum was to be paid, must prove, what that sum was. Whatever is the difficulty of believing, that sum could have been paid before the time of Hen. 8. the plaintiff's must succeed, unless the defendants can prove, what less sum was paid. There appears not to have been sufficient discussion, in the Court of *King's Bench* as to the meaning of the expression "accustomed to be paid." At first it was represented to be beyond the time of memory: but that was pared down, and very properly, so as to leave the construction open; and *Bennett* v. *Trepass* shews, it is not necessary to construe it to that extent: but upon the statute it was there considered, that eight years were sufficient. It is not however to be considered settled

Customary payment in lieu of Tithes need not be immemorial. Whether eight years sufficient, or what other period. *Quære.*

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settled in that case, that that is to be the period. Others have said, it is sufficient, if within the limits of the ecclesiastical law, which are much shorter than the time of memory. All the evidence, so far from supporting, was against, a customary payment. No attempt was made to prove any payment other than what had been put upon the record.

No doubt of the right of this Court to grant a new trial after a trial at bar. Principal, that the conscience of the Court must be satisfied.

There is no doubt upon the right of this Court to grant a new trial after a trial at bar. Courts of common law had great difficulty in doing that. But in those very cases it is admitted to be the practice of this Court; where the issue is directed to inform the conscience of the Chancellor; upon this principle; that it was the habit of this Court to try upon the report of the circumstances, viz. the trial, and all the objections, whether due attention had been given to all the considerations stated; whether, according to the common expression, the conscience of the Court was satisfied or not. The difficulty upon my mind, from the first moment this cause was brought forward, was, whether, if the counsel for the defendant had stated, that they meant to go to a new trial, to prove a payment different from that in their bill and answer, the Court ought to have said, if they gave up what they stated in their bill, their bill must be dismissed; and if they could not defend themselves according to their answer, upon the bill against them, not binding the inheritance, but being a bill for an account, against mere occupiers, and they could not defend themselves, there must be a decree for an account; and if they could make another ground, it must be by a new bill.

Between the two trials this discovery is said to have been made. The statute of *Charles* 2. (*a*), for assess-

(*a*) 22 & 23 Ch. 2. c. 15.

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ments of the parishes to be united, directs transcripts to be sent to the vestry, the Lord Mayor, and the registry of the Bishop of *London*. It does not appear, that there were transcripts in the offices of the vestry or the Lord Mayor; but in the registry of the Bishop of London there was a transcript of the assessments of 1676 and 1681. The rates of 1672 and 1681 nearly correspond. That of 1676 differs materially from both. Then it occurred naturally, that those, which were found there, were assessments for raising the joint demand upon the united parishes; and that the rate of 1676 was not a rate for the stipend of the minister; but, according to the note in that book, a rate for the minor canons' tithes, from March 1676 to 1677; and then the case took this turn; that there was a less rate; and it was proposed to prove that the less rate was composed of the sums in the rate of 1676.

The next question is, Whether the evidence, that was rejected, ought to have been received; and if so, the consequence of its rejection. There is little evidence what was the actual payment to the plaintiffs in lieu of their tithes. It stands thus as to any less payment. In the time of the common-wealth they granted a lease to *Morris*, as rector of *St. Gregory's*. A bill was filed by him in the Court of Exchequer for payment, according to the statute, of 2s. 9d. The lessees of the minor canons stated customary payments. At the hearing a reference was made to the Attorney-General of that day; and the fact is admitted, that no award was made. According to the record, the minor canons, who were interested in this proceeding, became parties to the reference; which was made by their consent, given in Court. The question is, Whether because no award was made by the Attorney-General, it is not evidence in

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in any degree? If for a century and a half afterwards no payment was made according to the demand, but payments were made according to the accustomed habit, more or less, it is extremely difficult to say, it is not evidence. As to the weight of it, that is a different question. It ought to have been admitted, not to prove any allegation in the bill or answer, but merely to substantiate this fact, that the demand had been made and was not pursued; and if that circumstance would have been evidence, supposing there had been no suit, it is impossible to say, it is not evidence, because the demand was made in a more solemn manner. That evidence therefore, if produced only for the purpose of shewing, that a demand was made, and was referred to arbitration, that no award was made, and the minor canons and their leases had not insisted on their demand afterwards, was to be received: at least upon the question, whether any less sum was paid.

Next, and this, I agree, is a considerable Question, if the circumstance of the rejection of that evidence, if material, what ought to induce this Court, as bound in justice, to grant a new trial? If that mere statement, that the evidence was material, and was rejected, is a ground for granting a new trial, if no answer can be given in this Court, regard being had to the nature and possible effect of this evidence, I am wrong in not granting it. But the principle, upon which the Court is to act is this; and whether that be the principle of the Courts of Common law, or not: this Court has a right, to be exercised very tenderly and sparingly, of deciding without any issues. Upon the payment, as stated upon the record, as it stood at the original hearing, I should have thought the Court had a right to refuse, but, if asked, ought to have directed, an issue. I should

Right of this Court to be exercised very tenderly, of deciding upon facts without an issue.

should have doubted, whether it should have been directed in the conjoint causes; doubting, whether a mere lessee could file such an establishing bill. But I could not have refused it upon the customary payments, stated in the answer to the bill of the minor canons. In *Bennett* v. *Trepass*, when the Court saw the parties were not agreed upon the sum, but, that the sum mentioned in the report might, as the three judges say, have formed aliquot parts of an invariable payment, I should have granted an issue; but should have put it upon the defendants to say, what was that sum. I cannot agree, that it is sufficient to say, there is some payment: nor that, because 2s. 9d. is so enormous, therefore it is not to be decreed; for the Court has directed issues, and decreed accounts, in cases full as enormous (*a*); as in the case of *St. Bride's* (*b*). There is great difficulty, where the defendants even upon a bill for an account only, not affecting the inheritance, put their defence upon one payment, in directing an issue in any other way.

Upon the other question, suppose customary payments discovered in the rate of 1776 between the two trials. That case of *St. Bride's* is very like this. There is hardly a circumstance of difference; and there the decree was made without any issue. There were all these lessees upon small fines and small rents. They had gone on, as in this instance for nearly two centuries; and quarrelled, much as they did here. Is the Court necessarily to grant a new trial, if material evidence was rejected; or, is it not at liberty, supposing it materially to consider, in what degree it is so; and

(*a*) O'Conner *v.* Cooke, 6 *Ves. Jun.* 665. 8 *Ves. Jun.* 525.

(*b*) Townley *v.* Wilson, *ante*, 117.

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whether the materiality is such, that, because it was rejected a new trial must be granted; even if the conscience of the Court is satisfied, that the conclusion is right! I do not state what are the principles of the Courts of Common Law in granting new trials. They must be supposed to act upon wise principles. But in all times this Court, in such a case as this, has exercised its discretion upon the whole case. New trials after trials at bar have been granted here, when the Courts of Common Law would not grant them; upon this consideration, whether the cause was tried in such a way as to be satisfactory; and if the jury have given such a result, the question which I think the Court ought to ask itself is, whether the jury would miscarry in making a different conclusion upon the rejected evidence.

The next consideration is, Whether this evidence would produce a different result; Upon the question, Whether this rate of 1676 ought to have gone to the jury, it was quite competent to the defendants to offer that, as composing the customary payment, upon which they were to insist. They said, and it is a very material argument, that this decree was made in 1545; that the minor canons had for two centuries and a half a right to call for 2s. 9d.; that, the law making that demand for them daily from 1545, they had only asked a very small fractional part; that they had been contented with that small fractional part down to 1763; and that it was to be inferred, that they were contented with it from 1545 to 1672; that there is the most decisive evidence that 2s. 9d. never had been received. I admit, that where it is clear, that something, not 2s. 9d. in the pound, has been paid, you are to endeavour to apply it, so as to fix the accustomed payment. I have nothing to do with the

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the enormity and injustice of the demand: but certainly the enormity of the demand is a circumstance of the evidence, that the legislature did not understand themselves to be giving such a demand; and it is most likely it was understood, that less than 2s. 9d. was to be due to them. But, if you cannot ascertain, by such evidence as the Court ought to deal with, rational and solid, not conjecture, that there was some certain payment, the second proposition fails; and then the question is, Whether this jury having had distinctly stated to them that the rate of 1676 was insisted on, and the difference between that and the other two, and the necessity of their concluding that the rate of 1676 was to give the rate of payment, yet if upon the rest of the evidence they refuse to fix it to be that, I am to grant a new trial. The difficulty upon the evidence, though very clearly proving, that less than 2s. 9d. was paid, to prove, what was paid, is extreme; applying it to either rate. The evidence consists of leases, not at invariable rents and fines. The proposition, that, because the leases was at less than the value, therefore tithes are payable at a certain rate is not made out. Upon the very case made for the defendants there is great difficulty as to the certainty of the payment. There might be a fixed payment for the scite houses; or a pound rent; or individual payments upon the individual houses. If a pound rent, that must be capable of increase; which does not at all weaken the certainty of the demand. But the case has been put as of individual payments for individual houses. Then is the negligence to be pressed all against the plaintiffs, and not against the defendants? If the former are to be presumed not to have neglected so great a demand, it must be equally presumed, that the others would have insisted upon the paying the sum they used to pay, and that they would not submit to pay higher

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higher sums, as that the lessors should forbear to demand the larger sums, if due.

But upon all this evidence and the fact of the demand made and referred to arbitration the conclusion is only, that great difficulties surround the case; but no evidence can be produced fairly to satisfy a jury, what is the payment, to exempt the defendant from this demand which is *prima facia* due; and which I believe will be paid principally through the difficulty in shewing, what is the customary payment. Admitting that I do not believe 2s. 9d. was the payment, if I cannot find out the payment, setting in a Court of justice, I must submit to the necessity the case imposes; and am therefore of opinion, that under the circumstances of this case there ought not to be a new trial.

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MORRIS v. THE WARDEN AND MINOR CANONS OF ST. PAUL'S.

9 Ves. Jun. 316.

THESE causes came on upon the Equity reserved.

An Appeal to the House of Lords does not stay proceedings in the Court below.

Mr. *Leach* for the Defendants in the first cause objected to have the Cause heard: alleging, that Instructions had been given to draw an Appeal to the House of Lords from the Order, lately pronounced by the *Lord Chancellor*, which though not actually lodged, the Court would, under these circumstances, consider as lodged.

The *Lord Chancellor* said, it was of no importance whether the Appeal was lodged or not; for an Appeal would not stop the Cause.

Mr. *Leach* took the distinction, that an Appeal to the Lords would stop the Cause; though an Appeal from the Rolls to the *Lord Chancellor* would not; referring to *Lord Pomfret* v. *Smith* (*a*).

The Lord Chancellor said, he had no idea that an Appeal to the House of Lords has that effect; observing

(*a*) Prac. Reg. Ed. by Mr. Wyatt. 25, 26.

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serving, that the cause of *Thelluson* v. *Woodford* (*a*) was proceeding every day under Orders upon motion, notwithstanding the tendency of the Appeal.

Mr. *Richards* for the Plaintiffs in the first cause said, that in *Wakeman* v. *The Duchess of Rutland* (*b*) a special application to stop the cause upon this ground, was refused by the House of Lords.

The Defendants then applied to present a Petition to discharge the Order for setting down these causes for farther directions; which was granted, with an intimation that it must be at the peril of costs.

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A Petition was presented accordingly: Mr. *Mansfield* and Mr. *Leach* in support of the Petition.

The effect of the Appeal is absolutely to suspend the Proceedings; and this Court has no discretion upon it. Until the case of *Wakeman* v. *the Duchess of Rutland* that was the received opinion, which certainly has been otherwise since: but the point was not discussed in that case so as to make it a binding authority. In the late case of *Fisher* v. *Eamer* a proceeding was taken, considering it upon principle, finding the Appeal, there can be no final Judgment, and until final Judgment no Execution.

By analogy to the practice of other Courts, in the superior Courts of Appeal, the King's Bench and Exchequer Chamber for instance, the Writ of Error removes the Record; and *ipso facto* the jurisdiction of

(*a*) 4 Vesey. Jun. 227.
(*b*) 3 Vesey, Jun. 233, 504.

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the Court below is suspended. Upon an Appeal from the Court of King's Bench to the House of Lords the Record is not removed: but a proceeding is adopted, authenticating it equally. The Record is transcribed; and carried to the Lords by the Chief Justice; and there compared; and returned to the Court of King's Bench. The Court of King's Bench, acting upon the Principle, will stay all proceedings: *Christie* v. *Richardson* (*a*).

The opinion of *Lord Chief Baron Gilbert* was, that an Appeal from this Court does remove the Record (*b*), of necessity then all proceedings are suspended. I admit, upon an Appeal from the Rolls on a re-hearing, the proceedings are not suspended, except by special Order. But that originates in the Order of Lord *Clarendon*. The distinction is that an Appeal or re-hearing in this Court is mere matter of indulgence in Courts of Equity, known to no other Court; and the Court granting that indulgence may impose terms. But an Appeal to the House of Lords is matter of right.

The Lord CHANCELLOR.

In deciding upon this Petition, I consider myself acting under the authority of the House of Lords. The clear understanding of that House is, that the proceedings in the Court of Chancery are not staid by an Appeal. According to this, if a Petition to stay proceedings in a cause was refused by the Chancellor, the Party would have nothing to do but to appeal from that Order. I admit there may be mischief both ways. But if that understanding, upon which

(*a*) 3 Term Rep, B. R. 78
(*b*) Gilb. For. Rom. 190.

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the House is acting, is wrong, it is more fit, that the House should correct it, than that I should act against Precedent. There are Appeals now depending before the House of Lords from this Court and the Court of Exchequer; and, though, if the question were *res integrâ*, I would not decide it in favour of this application, which would make a Chancery Suit the greatest nuisance, it is enough to say, there is that practice permitted by the House, which amounts to the Authority of the House. In this instance the application does not aim at substantive Justice; for upon what remains to be done there can be no reason for not giving the farther directions; and then the Appeal may be from the whole together.

Mr. *Romilly* (*Amicus Curiæ*) observed that in the Case of *Popham* v. *Harmer* (*a*) it is stated that the only way, in which proceedings can be staid in the Court below, is by an order of the House of Lords.

The Petition was dismissed with Costs, without hearing the Counsel against it; and the Cause proceeded.

(*a*) Collin's Appeals in continuation of Bro. P C.

THE

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May 11, 15.

53 GEO. 3.—CHANCERY.

THE WARDEN AND MINOR CANONS OF ST. PAUL'S, LONDON, v. KETTLE.

KETTLE v. THE WARDEN AND MINOR CANONS OF ST. PAUL'S.

2 Vesey and Beame 1.

THE Bill in the first of these Causes, filed by the Warden and Minor Canons of *St. Paul's* and their Lessees, stated their Title as Parson and Proprietors of the Church of *St. Gregory*, under Letters Patent, 24 *Hen. 6th*, to all tithes, &c. within that parish; and the decree made on the 23*d of February*, 1545, in pursuance of the Act of parliament for tithes in *London* (*a*); by which it was directed that the Inhabitants of London should pay tithes at the rate of 2s. 9d. in the pound.

Decree for tithes in London at 2s. 9d. in the pound under the statute 37 Hen. 8. c. 12: the occupiers not proving any certain customary payment in lieu of tithes;

which payment will exempt an individual house if usually made a sufficient time to acquire the character of customary; though within time of memory, and not general through the place or parish.

Mere non-payment of the tithes under the statute is not an answer; as it would not be to the claim of the tithes at common law.

An issue refused under the circumstances: 1st, mis-pleading; the defendants not stating customary payments by their answer; but adopting *ore tenus* payments, disclosed by their answer to their cross bill, instead of moving for leave to file a supplimental answer: 2dly, the improbability of establishing those payments after two unsuccesful trials at bar in another cause.

(*a*) Stat. 37 Hen. 8. c. 12.

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The bill also stated the Act of parliament (*a*) for rebuilding the City of *London*, uniting the parishes of *St. Mary Magdalen, Old Fish Street*, and *St. Gregory*, and the Act (*b*) fixing among others the tithes of those two parishes at £120; both these Acts saving expressly the right of the Plaintiffs Parson and Proprietors of the Church of *St Gregory*, to receive all tithes, &c. within that parish, as before; and the bill prayed an account of tithes due from the defendants, occupiers of houses within the parish.

The defendants by their answer, stating their belief that at the time of the decree of 1545 less sums than 2s. 9d. in the pound had been accustomed to be paid for tithes in respect of the houses, occupied by the defendants or the scites thereof, insisted, that they ought to pay only such sums as had been so accustomed to be paid at the time of the decree; and "as Evidence of such accustomed payments," they alleged, that no tithes or yearly payments in the nature of tithes have ever since the said decree been paid, at or after the rate of 2s. 9d. in the pound rent; and as farther evidence, that it does appear from documents in the possession of the plaintiffs, that from the year 1595 to the year 1763 (with such Interruption only in 1661 as after mentioned,) Leases of the tithes of the said parish were from time to time let to certain inhabitants in trust for the parish at large, at annual rents; which varied but little before 1630; and have since that period been invariable; and upon fines, cal-

(*a*) Stat. 22 *Ch. c.* 11.

(*b*) 22 and 23 *Ch.* 2. *c.* 15. This statute is more confined than the 37 *Hen.* 8. *c.* 12, the statute of *Henry* extends both to lay impropriators and spiritual persons, while the stat. of *Charles* applies to preaching Ministers only. *Ward* v. *Hilder*, ante, 103.

culated

culated, except in three instances, after the rate of £50 upon every renewal, where fourteen years of the former lease were unexpired; whereas, if the said tithes had been payable at the rate of 2s 9d. in the pound, the fines and rents upon such Renewals would continually have increased; and would even in 1661 have amounted to nearly ten times the Value so paid by the parish to the warden and minor canons as fines and rent; and, as farther evidence that it did appear from the Records of the Court of *Exchequer*, that in 1661 the warden and minor canons granted a lease of the tithes of the said parish to Thomas *Morris* and Ann his *wife* for twenty-one Years; that *Morris* and his *wife* in 1661, filed their Bill in the Court of *Exchequer* against *Turner* and other inhabitants of *St. Gregory*, claiming payment of tithes after the rate of 2s. 9d. in the pound, or according to the ancient accustomed payments, if such there were; and that the defendants in that suit by their answers insisted, as these defendants now insist, that there existed at the time of the decree in *Hen.* 8. a certain accustomed payment for the premises respectively occupied by them less than after the rate of 2s. 9d. in the pound.

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The answer farther stated, that upon the hearing of that cause issues were directed, to try the fact of such accustomed payments: upon the trial of which issues it was ordered, with consent, that a juror should be withdrawn and the difference referred to the then *Attorney-General;* that no traces are to be found of the award, made by the *Attorney-General:* but it does appear by documents in the possession of the plaintiffs, that the claim to tithes after the rate of 2s. 9d. in the pound was abandoned; that the lease, granted to *Morris* and *wife*, was surrendered; and in the year 1666, a lease for eighteen years was granted by the warden

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warden and minor canons to certain inhabitants in trust for the parish at the same rent, which had been before, and ever after continued to be, the rent paid by the parish for the tithes.

As farther evidence of the said accustomed payments the defendants alleged, that during the Usurpation of *Cromwell* no tithes were paid in *London*; and it does appear from an entry in an ancient book belonging to the said parish of *St. Gregory* that at a Vestry, held for such parish in 1661 for the purpose of renewing the collection of tithes, certain persons were appointed by the said parish to examine the new tithe book with the old book; thereby demonstrating, that the said tithes were then paid, not after any equal rate of payment, according to the rent, but after some ancient book or roll; and, as farther evidence, that the last of the leases, usually executed by the warden and minor canons, was suffered by the Parishioners to expire in 1760; refusing to renew; considering it disadvantageous to them, by reason of the losses sustained in collecting.

The answer then insisted, that the intent of the Act of the *22d and 23d Chas.* 2. was to substitute in the parishes, which had suffered by the fire, certain annual sums for the maintenance of the Ministers in lieu of tithes, payable under the decree of 1545, by reason that the said tithes had become uncertain in collection from the fire having taken away many houses, and altered the foundations of others; that an annual payment of £120 was thereby to be made in lieu of tithes to the Minister of the parish of *St. Gregory* and *St. Mary Magdalen*, which were united by the said Act, and to be paid proportionably by the said united parishes; and that the last clause in the said Act, providing

viding that the warden and minor canons notwithstanding that Act should continue to enjoy all tithes, as they formerly had or lawfully might have done, was totally inconsistent with the general spirit and intent of that Act; subjecting the parish of *St. Gregory* to an unequal and double payment by charging upon the said parish in common with the others, mentioned in the Act, a new and certain annual maintenance to the Minister in lieu of tithes, continuing in that particular parish the tithes also.

The answer farther stated, that from transcripts in the registry of the diocese of London, the first assessment under the act of *22d. and 23d Chas.* 2. was made in 1672 and the second in 1681; which second assessment had ever since continued the assessment, by which the Minister's maintenance is apportioned and collected in the said united parishes. The amount charged upon *St. Gregory* by the assessments for its proportion of the Minister's maintenance, was £90: 16s. 8d.; which sum was by the assessments divided among the then occupiers in the nature of an equal pound rate, upon the rent or value of the property respectively occupied by them; and the Sums, assessed in respect of different property in the assessment of 1681, have with very few exceptions ever since been continued thereon. The accustomed payments (if any) to the warden and minor canons in the nature of tithes, amounted to something about the same sum as the proportion of the Minister's maintenance and the necessity of making an equal pound rate for the Minister's maintenance, introduced into the parish the notion of an equal pound rate for the Minor Canons' tithes: each defendant alleging, that up to 1792 (from which period the Bill claimed the tithes) he paid "in respect of the pre-"mises occupied by him in the said parish the annual "sum

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"Sum of," &c. "for the "Minister's maintenance, and "also the like annual sum of" &c. "for the Minor "Canons' tithes."

The answer farther alledged, that the plaintiffs were possessed of a certain book, entituled "a register "of the land and tenements belonging to the Minor "Canons:" in which is the following entry—"the "annual rate or sum of money yearly £120 in lieu "of tithes for the incumbent of the united parishes of "*St. Mary Magdalen, Old Fish-street and St. Gre-*"*gory*, assessed by us, whose names are subscribed, by "virtue of a decree of the *Lord Chancellor*, bearing "date the 25th day of *February*, 1672; which said "rate is levied upon the parish of St. Gregory by an "equal and proportionable rate with the aforesaid "parish, over and above the full tithes due and pay-"able to the Warden and Minor Canons of *St. Paul's* "according to the said decree.

This entry is followed by the names of persons, who appear to have been the Inhabitants of the said parish of *St. Gregory* about the Year 1762: and opposite to each name are set two columns of sums: the first column being sometimes entituled "last rate," and some-"times new rate;" and the other column being some-"times entituled "first rate," and sometimes "ancient rate," and at the foot, and within the lines, which form the first Column, is the following Memorandum: "note, that all within this Apartment is as it was last "rated for the petty Canons tithes, from *March* the "25th, 1676, to *March*, 1677;" the "first rate" is a copy of the Assessment of 1672. but the "last rate" is not a copy of the Assessment of 1681.

The answer farther alledged, that upon a comparison of the transcript roll of 1672 with the transcript roll

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roll of the rate of 1681, it would appear, that a very great proportion of the sums is precisely the same in both rates; and they differ only in such manner as might be expected from the change of condition and improvement, which in nine years would happen in the property assessed; but, upon comparing the two columns or names in the said register book, entituled "last and new rate," with the assessment of 1672 and 1681 it will appear, not only that the sums therein are not the same as those in either of the said two assessments, but that they bear no relation or proportion thereto; being sometimes treble, sometimes double, and sometimes less than, the sums in the rates of 1672 and 1681; from whence it appears, that the "last and new rate" was not one of the rates made for the Minister's assessment, as supposed by the writer of it; and that it was not an equal pound rate; by reason that it bears no relation or proportion to the other two rates, which were clearly pound rates; but that, from the memorandum at the foot, it manifestly was the rate, by which the minor canons' tithes were last collected, from *March*, 1676, to *March* 1677; and that, not being a pound rate proportioned to the then value of the premises occupied, it must have been an "ancient rate."

The answer then insisting, that such rate does contain the ancient accustomed payment within the parish, for or in the nature of tithes, and that the defendants ought to pay for tithes (if any thing) only such ancient sums as in the said rate are charged upon the premises now respectively occupied by them, or upon the scites thereof, or the buildings then thereon erected and built, concluded by stating, that the defendants have no means of ascerting, what particular sums are charged in the said rate on the premisses now occupied

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pied by the defendants; but the plaintiffs, in an answer to a cross bill, filed against them by *Robert Morris* (*a*), did state, that they had used great diligence in tracing out and had thereby learnt and could distinguish, except in a very few instances, as they believed, the particular premises, mentioned or referred to in the said two assessments in the said register book, which were then occupied by Morris and others, plaintiffs in such cross suit, as well as by the other inhabitants of the parish respectively.

The defendants, by their cross bill, stating the several matters alledged in their answer to the original cause, prayed a discovery.

The Warden and Minor Canons in their Answer to the cross Bill stated, that in the 4th and 5th of *Philip and Mary*, a lease of the tithes, or payment in lieu of tithes of *St. Gregory*, was granted to *William Berwicke* for 21 years, at the yearly rent of £25: that in *December*, 1595, a lease was granted in consideration of some Fine, (the amount of which is not stated in the lease), in trust for the Parishioners, for 21 years, at the annual rent of £37 for the first three years, and £38: 8s. for the remainder of the term: which lease was renewed, and leases of the tithes from time to time, except during the rebellion, until the lease, which expired in 1763, as after stated, were granted, and renewed by the Minor Canons for the time being, to certain of the inhabitants of the said parish, in trust for the others, on payment of fines; but which leases were not granted at invariable yearly rents: and the fines, paid on the renewal of such leases, varied only in proportion as more or less of the said terms of 21

(*a*) ante, 169.

years

years happened to be expired; stating as instances, a fine of £200 paid on a lease, in 1630, for 21 years; on surrender of a former lease, of which eleven years were unexpired; on another lease, granted in 1700, for the like term on the surrender of a former lease, of which 16 years were unexpired, a fine of £109, and on a lease granted in 1707, of which seven years were unexpired, a fine of £50. The answer admitted that the sums assessed in respect of the different premises in the assessment of 1681, may have been, with very few exceptions, ever since continued upon the same premises, or upon the scites thereof, or the buildings from time to time thereon erected; denying that the accustomed payments amounted to something about the minister's maintenance; stating, that when a survey was made of all the ecclesiastical benefices, under the statute 25 *Hen.* 8. c. 3. the tithes of *St. Gregory* were estimated at £19: 7s. 6d.; that in 1638 they were estimated at £140, and in 1676 at £100; and the last and new rate was an ancient rate; or contained the ancient accustomed payments within the parish for or on in the nature of tithes.

Mr. *Leach*, and Mr. *Roupell*, for the defendants in the first Cause.

The proper *forum* for the decision of this question is a jury; and that was your Lordship's opinion in the *Warden and Minor Canons of St. Paul's* v. *Morris* (*a*). The defendants, having no other means of proving the exceptions, on which they rely, than by reference to the rate in the possession of the plaintiffs, for that purpose filed the cross bill; the answer to which has disclosed, what are the particular payments substituted

(*a*) ante, 169.

for

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for those established by the statute and decree. The different leases, granted by the Warden and Minor Canons for the time being, are utterly inconsistent with their present claim, as being irreconcilable with an increasing value; standing on the basis of a permanent value, never fluctuating even by the most opposite events; never rising with the increasing value of property, nor falling with the diminished value of currency. From 1630 to 1742 the same rent is invariably reserved; and from 1595 to 1630, the difference is merely two or three pounds; probably resulting from the ease or difficulty of collecting the customary payments. The fines will not afford any conclusion more favourable to the plaintiffs; being from 1707 to 1742 precisely the same on every lease; and the quantity of each term unexpired at the periods of renewal, is not in a proportion that can form the foundation of any argument. The greatest fines are those of the most distant dates; a fact as little to be reconciled with the notion of an increasing value of the tithes in proportion to the depreciated currency, as the uniformity of the rents. Upon that Hypothesis in 1630 the fine ought to have been £600 instead of £200. This variation may be thus accounted for. The lessees, finding difficulties in the collection, which they had not foreseen, and sustaining losses they had not calculated upon, would naturally on each successive renewal stipulate for a reduced fine.

The next ground of defence is the suit in the Court of *Exchequer*, in 1661. It is true, the award of the *Attorney-General* is not forthcoming; but the fact that a new lease was granted three years afterwards at the old rent is equivalent. The question returns to this: whether the defendants have shewn the existence of payments, substituted for those prescribed by the statute

statute and decree; your Lordship having expressed a decided opinion, that the statutory payments never have in fact existed; and the whole of these transactions incontrovertibly prove, that 2s. 9d in the pound never prevailing as a payment in this parish; but that there always has been an ancient customary payment in lieu of it.

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Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Wetherell*, for the plaintiffs in the original cause.

This is merely the re-hearing of the cause of the *Warden* and *Minor Canons of St. Paul's* v. *Morris*. The plaintiffs, in the character of rector, must recover the payments according to the statute, unless the defendants can prove customary payments in lieu of them The attempts to plead these alledged customary payments, as a parochial modus, which clearly they are not, fails altogether in proof. If the court would let the defendants into proof of a parochial modus, the leases furnish evidence in opposition to its existence. The argument, drawn from the uniformity of the leases, is erroneous. They vary in rents and fines; a fact inconsistent with a settled customary payment; nor have the defendants shewn, that the lessees invariably received the same customary payments from the parishioners. The rates are not more favourable to the defence; rather furnishing evidence against the existence of a *modus*. In all cases, where a *modus* is set up, it should be stated with clearness and precision; though this is not less material in an answer, than a bill (*a*). Not one of the defendants mention the sum, which he considers as the *modus*; all alledging, that

(*a*) See Scott *v.* Smith, 1 Vesey, Jun. 145, and the reference in the Notes. Wood *v.* Wray, Gwill. 1457. Austr. 838.

they

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they are unable to state any *modus*; yet on an allegation so vague an issue is asked, for the purpose of establishing as *moduses* certain specific sums never mentioned in the pleadings. In some respects the defendants assimulate them to farm-*moduses*: but then they ought to state, not merely the precise sums, but the specific property covered; each setting up his own individual *modus*, and specifying his property covered by it. There is no instance, where the court has dispensed with a defendant's setting out the specific sum, which he alledges as a *modus*. Had these defendants, however, proved all they alledge, it is difficult to conceive, how the Warden and Minor Canons could be bound by rates, made, not by them, but by the Lessees, contracting for themselves. The inference, drawn from the decrease of the fines in the latter periods, proceeds on a supposition, that this is a parochial *modus*. Their fluctuations prove no more, than that the Wardens and Minor Canons, like most other ecclesiastical bodies, have been very negligent of their interest. Your Lordship has (*a*) said, that the customary payment, alluded to by the act of *Hen.* 8, was not necessarily to be carried back to the time of *Richard* the First; but it is not proved to have existed at any time before the act. If, as is alledged, the 2s. 9d. in the pound was for a time after the fire of *London* not collected, the reason probably was, that the misery and poverty, which followed that calamity, induced the Warden and Minor Canons to forego for a time the full exaction of their rights.

Mr. *Leach* in reply.

All, that has been decided by your Lordship and the

(*a*) See 9 Ves., Jun. 165. and Bennett v. Trepass, ante, 125.

House

House of Lords is, that a new trial should not be granted. The statute of 37 *Hen.* 8. says (*a*), that there were certain places or districts paying less than 2s. 9d. in the pound; not pointing to individuals. These occupiers say, the parish of *St. Gregory* was one of these places.

Is not this a case, in which, to use your Lordship's words, the court would exercise its Rights of deciding without an issue "very tenderly and sparingly?" The Warden and minor canons appear to have renewed, at a rent of £40: 6s. 8d. when, had they been entituled to the 2s. 9d. in the pound, they might have demanded at least £800. They cannot be represented as having acquiesced in their loss, or as inattentive to their interest. These suits too strongly prove the reverse. The property covered is described in a maner perfectly intelligible to the plaintiffs, who knew the scite of each house; and can state, what stood on each foundation fifty years ago. If the precise amount of the customary payment is not stated, the plaintiffs are referred to the rate, which they admit to be in their possession; and that they are acquainted with its contents; a mode of pleading unquestionably sufficient to put them in possession of the amount.

The LORD CHANCELLOR.

Under the two statutes of *Henry* 8. *and Charles* 2. (*b*) it is clear, that the plaintiffs in the original cause are entitled to 2s. 9d. in the pound, unless the inhabitants can protect themselves under the 18th clause of the statute of *Hen.* 8. directing that, where less

(*a*) c. 12, s. 18.

(*b*) Stat. 37 Hen. 8. c. 12. 22 Ch. 2. c. 11.

hath

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hath been accustomed to be paid for tithes, the payment shall be "after such rate as hath been accustomed." The opinion of Lord Chief Justice *Eyre* was, that this statute was never intended to give to individual houses the benefit of customary payments, except as applying not only to individual houses, but generally to some place; that it was rather a parochial payment than a payment attached to individual houses. That opinion appears to me to be well founded; but it is impossible at this day to act upon it; many cases having established that an individual house may be protected, provided the owner or occupier can prove a customary payment in this sense, that previously to to this act of 1545 that payment had been so long made as to have acquired the character of customary payment with regard to tithe; and the construction is not, that it must be a payment time out of mind, but, if that payment has been usually made during such time as to have acquired in the Ecclesiastical Courts the character of a customary payment, the statute operates upon it.

That was decided in *Williamson* v. *Gosling* (*a*), a very leading case; which proves that to be the law of this day. *Gosling* was the owner of four Tenements three subject to customary payments, the fourth not. He pulled them all down and upon the scite erected two new Tenements; and it was contended, that from the change in the nature of the premises the customary payments could not attach; but the Court of *Exchequer* held, that the payment was to be compounded of the Value of the three customary payments, and the tithe at 2s. 9d. in the pound for so much of the premises as was erected upon the scite of the fourth

(*a*) ante, 152.

Tenement

Tenement, to which no customary payments had been applied.

There is no doubt therefore, that, if these individuals can prove, that before this statute a sum of money was raised upon each house, so long before as to have acquired the character of a customary payment, to so many houses as it can be applied to it is in law applicable; though there is no such general custom through the place or parish. I repeat what has been said in many late cases; that, whatever may be the probability that 2s. 9d. in the pound never was paid in this parish (and I do not retract the belief I expressed in the case of these plaintiffs against *Morris* (*a*), that it never was paid), yet I cannot regard that fact as more than negative evidence, strong negative evidence, if connected with material positive evidence, that there must have been some other payment due from the Parishioners; but I apprehend, it is equally clear upon grounds lately discussed, and clearly established, in the House of Lords, that in this case of a claim of this payment, as in the instance in the claim of tithes more strictly, it is not sufficient for the defendant to say against the claim under the statute, as it would not be sufficient against the claim at common law, that the plaintiffs never had received the 2s. 9d.: but it is incumbent upon the defendant to shew himself to be entitled to the benefit of that decision by saying, that he is the occupier of premises, describing them, to which those customary payments which he can specify, can be proved to have attached previously to this statute of 1545.

So the law obliges me to dispose of all the argument from the circumstance, that the parish were, through centuries, lessees of the tithes from the minor canons;

(*a*) The warden and minor canons of St. Paul's v. Morris, ante, 169.

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as in case of *St. Bride's* parish, where the same thing occurred, that the tithes were let at such comparative value, that it was impossible to believe, that two shillings and nine-pence was conceived, either by the minor canons, or their lessees, or the parishioners, to be the sum; the fines with the rent, bearing no proportion to the magnitude of that payment. The answer to that is—that, they must have the two shillings and nine-pence, unless some other rule of tithing can be established, founded on the fact of a customary payment, of a certain less specified sum, due when the statute passed. It is therefore to no purpose to lament —however lamentable, that this has gone on from century to century in so amicable a way, that the parties seem to have forgotten what was due to themselves, not preserving evidence of the payments, they insist upon as customary.

Supposing this to be the law, the question remains as to the pleadings. Upon the answer to the original bill, it is impossible to say, they have so pleaded their exemption, as to entitle them to an issue; that is established by the late case, in the Court of *Exchequer;* but it is said, if the minor canons knew what were the customary payments, and the occupiers did not know that they did not in their original answer, state those payments from incapacity to do so.—And it is against conscience, to let the plaintiff's take advantage of that omission, when, by making a discovery, they can remove the obligation. Therefore, it is said, the cross bill was filed, and the minor canons have made a discovery of this book, and the premises; that the answer to that cross bill, must be taken with the original answer, and therefore the exemption is well pleaded. I think it impossible to maintain that proposition; the defendants having obtained this discovery,

very, ought to have moved for leave to file a supplemental answer; and the court will not take an argumentative answer, that it may be so—but, when to a bill for tithes, a modus, or customary payments of this kind are pleaded; the plaintiff has a right to call upon the defendant, to set out upon his oath, his belief that it is so. I will, however, take it as if they had in the original answer pleaded technically and properly, that this column in the book produced, provided the premises can be identified, points out the customary payment for each house, and examine whether it is possible that this can be so probably made out as fact, that issues ought to be directed.

First, though this is not a parochial exemption, yet from the nature of it each Parishioner must insist, that every house or nearly every house, is covered by some payment peculiar to it, not the same in amount, but the same in this respect, that it is a customary payment; and there is no evidence, by which they can make out their houses to be so covered, that would not prove a customary payment equally for every house, identified with those of the rate of 1676. This has been tried twice: and the materiality of this old rate of 1676, as distinguished from those af 1672 and 1681, was fully considered. It was the very circumstance, which in aid of others, that were not equal to the effect contended, was mainly relied on in the trial.

My opinion, that I was right in refusing a new trial here, and joining in refusing it in the House of Lords, is confirmed by a more accurate examination of this rate. It is supposed to have been in 1676. The suit in the Court of *Exchequer* was relied on, which accounts for all these animosities and quarrels, by a suggestion upon the record, that the Rectors found it excessively difficult to collect such small sums from an infinite

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infinite variety of persons continually changing; and were therefore very glad when they could keep the matter quiet, by getting the parish to become the lessees. The bill in that suit was filed against several defendants, eight or nine, who in 1661 pleaded with great accuracy customary payments: most technically stating the houses, and the sums applicable to them. If those sums, stated in that year by a very considerable body of defendants as customary payments, were really customary payments, and the rate of 1676 is to be taken as establishing the customary payments in the parish, it is difficult to conceive, that the payments alledged in 1661, would not be the payments in 1676 also. Examining the answer, in that cause in 1661, with this rate, you would expect to find the rate containing the same sum, paid for the premises (to take one instance) of Sir —— *Turner*, as he had in his answer in the Court of *Exchequer* stated, as the payment, upon his oath. It is the more remarkable, as this rate is signed by him. In his answer he states the customary payment as 13s. 3d.: but here is his name to the rate containing a perfectly different sum; and I have traced the variation through many others. The names of the defendants I cannot find: they probably had changed their habitations. But as to the payments the other defendants set up, if they were the ancient payments, though there had been change of inhabitants, yet the ancient payment for a house in 1661 must be the payment attaching upon the same house in 1676.' I find in this rate of 1676 but one instance of a payment corresponding with the answer.

There is another way of putting this case. It is impossible to ascertain, when this note was written at the bottom of this column; as it is within date: but it is remarkable, that the sums thus rated upon that parish, amount

amount within a trifle to the payment of £120 for the maintenance of the minister.

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After two trials at bar, when it was admitted, that through centuries there has been no customary payment, and no man has been able to say what it was, where there is no evidence before me, that there has been a customary payment, when clearly there has been none, and payment by assessment is proved, repeating, that this Court though it has the power of deciding upon fact, as well as law, ought to be very cautious in deciding upon doubtful facts, I ask, is this a case, that I ought to send to a Jury? as the answer to that question can admit of no doubt as to some of the defendants, not identifying their houses, so as to others this is a defence in common, with those who have tried the question on behalf on all, having that defence in common; and having heard all that has been observed upon this old rate, which is the only positive evidence, supposing it evidence of a customary payment, as it is not, my conclusion is, that by permitting this to go farther I should give a mere chance: therefore this sum of 2s. 9d. though I believe it never was paid, must be paid, unless the defendants can in some legitimate way make it probable that some other payment has been made. Of that there is no probability; and therefore the decree must be for the payment of 2s. 9d. against all the defendants.

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ROLLS, *July* 1, 2, 21.

46 GEO. III.—CHANCERY.

ANTROBUS v. THE EAST INDIA COMPANY.

13 *Vesey, Jun.* 9.

Decree under the Statute 37 *Hen. VIII.* for payment of Tithes in *London* as to warehouses erected by the *East India Company* upon the scite of old buildings, and occupied by them at 2s. 9d. in the pound upon the value to be let, without an issue, no specific customary payment in lieu of Tithes being alleged.

THIS Bill was filed under the Decree and Act of Parliament, 37 *Hen. VIII.* for the payment of Tithes in *London*, seeking payment at the rate of 2*s.* 9*d.* in the pound upon the annual value to be let of premises consisting of extensive warehouses lately erected by the *East India Company*, and used by them in the course of their trade. These warehouses were erected upon the scite of small tenements, some of which appeared by the answer to have been formerly occupied at low rents: as to the others, the ancient rents were not known. The answer did not state any specific customary payment in lieu of tithes, but alleged generally that some less sums than after the rate of 2*s.* 9*d.* in the pound were paid, specifying by a schedule some payments, not however carrying them back to the date of the Statute.

The defendants insisted that the payment, according to the Statute, could be only upon such of the old rents as were ascertained, and that nothing was to be paid in respect of those premises, the ancient rents of which were not known; and they contended that an issue ought to be directed, which was opposed by the plaintiff, insisting that no specific customary payment being set up, no foundation was laid for an issue.

Mr. Richards, *Mr. Leach*, and *Mr. Wetherell* fo the plaintiff.

These

These premises not being exempted from Tithes by any accustomed payment, the Rector of this parish has the same right as other Rectors in the City of *London* have under the Decree and Statute. To avoid the right the defendants must shew a certain customary payment, otherwise the general right by common law or statute not applying, the Rector would not be entitled to any thing. The fact also that there is such customary payment must be put on issue, and therefore those who insist upon the particular right against the general right by law, must state with accuracy that particular right, as they could not resist the general right by alleging that there is some modus, not stating what that modus is. A defendant by his answer, setting up a particular modus, cannot prove another modus different from that put in issue by the answer; as the plaintiff would be deprived of the opportunity of disproving that modus which is not put in issue. Here is no allegation of any certain accustomed payment protecting the occupier from this payment at the date of the Decree and Statute. They allege merely that at certain particular times there were particular payments, with a general allegation that some less sums than after the rate of 2*s*. 9*d*. in the pound were paid, not referring to the particular sums before stated, as those less sums. The question, therefore, whether an accustomed payment exists, is not raised upon this record, though now it is not necessary to state a modus with the same strictness as formerly, it must be stated with convenient certainty. This allegation is too loose as to customary payments, not stating what they were, nor upon what rents to be calculated. Under such a loose assertion of customary payments they cannot prove customary payments. *Lord Eldon's* opinion in the case of the *Wardens and Minor Canons of St. Paul's* v. *Morris*, *(a)* was that the issues ought not to have been granted.

(a) Ante, 168.

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The next consideration is there being no rent subsisting whether the payment is to be caculated upon the old rent or upon the present actual value of the premises to be let. If the object of the legislature was to impose this payment only upon persons paying rent, and not upon owners occupying themselves, the Statute as making a provision for the Minister is perfectly nugatory. What necessity was there for the clause exempting, expressly, houses of noblemen and halls of companies, unless under the general enactment every owner occupying his own house was liable? that clause is certainly involved in considerable obscurity. Probably such houses were not before subject to Tithes; and therefore were not intended to be subject to the payment under the Statute. One *casus omissus* is obvious; that the legislature did not look to the depreciation of money, when they made the actual rent at which the premises occupied by the owner were last *bona fide* let, the standard; but both within the letter and the meaning the houses must be the same. Can it be said that those houses being taken down, and much more valuable premises erected on the scite, those premises are the same, and the former rent is to be the criterion? Suppose a garden occupied for profit, and therefore charged under the Act to be built upon the rent of £50 converted to £10,000, the duty of the Clergyman also being considerably increased, could the proposition that the occupiers of these houses were to pay upon the rent of the garden, be maintained. To meet such a case, "rent" must be supposed to mean "value," the only standard with reference to premises that have not been used for profit, to which also the words "without fraud or covin," particularly point.

In *Green* v. *Piper*, (*a*) the construction put upon the Act is, that all houses are chargeable, except those as to which there is a particular clause of exemption; which was considered necessary for the purpose of exemption. In *Sheffield v. Pierce* (*b*) 2s. 9d. in the pound upon the improved rent was declared to be due. *Ivatt v. Warren*, (*c*) *Ward v. Hilder*, (*d*) *Grant v. Cannon*, (*e*) the decree was for payment upon the value of the premises confessed in the answer. *Sayer v. Mumford.* (*f*)

In *Williamson v. Gosling*, (*g*) and *Bramston v. Heron*, (*h*) the Decree was according to the yearly value of the new houses, built on the scite of the old houses, with costs.

In a very late case, *Kynaston v. the East India Company*, (*i*) to a Bill by an Impropriator, the defence was, that the defendants having built the warehouses, and being themselves the owners, there was no rent; and the buildings formerly on that situation were inhabited by persons of a low description, paying very small rents. An enquiry was directed as to the annual value, and a Decree was made for payment upon that; from which Decree, however, an appeal was made by the *East India Company*, and the House of Lords affirmed the Decree.

Mr. *Adam*, Mr. *Alexander*, and Mr. *Wyatt*, for the defendants.

The customary payment is stated sufficiently to enable the defendants to go into evidence. It is not necessary to state it as a modus. It is stated, as it was in *Bennett v. Trepas*, (*k*) and *Kynaston v. the East India Company*. (*l*) If, however, this is to be so strictly

(*a*) Ante, 34. (*b*) Ante, 97. (*c*) Ante, 88. (*d*) Ante, 103. (*e*) Ante, 107. (*f*) Ante, 111. (*g*) Ante, 152. (*h*) Ante, 139. (*i*) Ante, 162. (*k*) Ante, 125. (*l*) Ante, 162.

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considered, a plaintiff seeking to establish a *modus* must prove it strictly, and prove it as he lays it. But a defendant in a suit for Tithes, is not under the necessity of proving a *modus* exactly as he states it. If upon the record a *modus* appears that would repel the demand, the defendant may go into evidence upon that. In *Atkyns v. Lord Willoughby de Broke*, (a) the distinction is taken by the Lord *Chief Baron*. In several cases in *Ambler*, a *modus*, though very loosely stated by way of defence, was allowed *Mallock v. Browne*, (b) *Wood v. Harrison*, (c) *Chapman v. Smith*, there cited. The distinction of the *Wardens and Minor Canons of St. Paul's* v. *Morris*, (d) is that there was an establishing bill, and therefore it was necessary to prove the payment as laid. The result of the authorities is, that if a defence appears by the answer, the Court will not make a Decree against, but will put in a course of investigation. This defence is put upon the same ground as that in *Bennett* v. *Trepass*, and *Kynaston* v. *The East India Company*, on which the answer was very general and no objection was taken. The question was not upon any customary payments: the point made by the defendant was, that there being no previous rent to go by the plaintiffs were entitled to nothing.

2ndly. As to the construction of the Act, the distinction between rent and value is perfectly understood, both in common parlance and legal acceptation. Some strong reason is necessary to give it a different sense from that which it hath naturally. In the instance put of a garden built upon, could a construction be adopted, the effect of which would go infinitely beyond the object of the legislature. That object was

(a) Amb. 423. (b) Amb. 563.
(c) Ante. (d) Ante, 169.

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to fix the provision of the Minister at a proper compensation, upon a criterion not fluctuating. That could not have contemplated that a great company would arise and erect great warehouses upon premises previously occupied by small tenements; that in such an event, the Minister's duty being also diminished, he should receive upon the increased value. Recourse should be had to the legislature; but this Court cannot adopt a construction that will give to this provision an excess that could not be intended, and would not be proper for any Minister. The object of the Decree and Statute was to establish peace upon this subject in London, not to raise the revenue of the Clergy. *Dunn* v. *Burrell and Goffe, (a)*.

In the first and second clauses of the Statute, rent cannot possibly be referred to value, being from its adjuncts clearly fixed to its proper meaning. Can the expression of the 4th clause, "after the quantity "of such yearly rent as the same was last letten for, "without fraud or covin, be construed," according to the value. The question is whether the rent taken as the criterion is fraudulent or not. Other clauses are equally against this forced construction: that they were to go into the investigation of a subject of great uncertainty, upon which, more than upon any other, professional men differ; no other word than rent having a determined appropriated meaning being used. In the 8th clause, as to mansion houses, the same word "rent" is used, not "value." The plaintiff, therefore, is compelled to rely upon the 16th clause, providing that the Decree shall not extend to houses of noblemen, halls of companies, &c. that is, a regulation as to those houses, merely in that condition, not where they may fall into any other condition: a regulation for

(a) Ante, 44.

exemption

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exemption in that particular situation, not providing for a future change; not laying down any rule applicable to an altered state; when, the house falling into other occupation than that of a nobleman, rent shall be ascertained. A construction against the natural import of a word, unless it is used in a manner so vague and uncertain as to force another construction, is inconsistent with every rule.

The case of *Skidmore* v. *Eire, (a)* decided in the 5th year of King *James I.* sixty years after the Decree, a case then of very considerable authority was put upon the ground of fraud in reserving less rent "than had "been accustomed or is paid." The second resolution is an express authority for these defendants that such houses as were never let is *casus omissus*, shewing that it was generally understood that this Statute had not provided for every case. The 16th clause certainly has difficulty, but the other parts of the Act, which are clear, cannot be construed with reference to that.

In *Ivatt* v. *Warren, (b)* the next case in point of time, the 2*s.* 9*d.* was upon a rent of precisely £9, without a fine. The word "value" must have been therefore used in a loose sense. In *Ward*, v. *Hilder, (c)* both the word "rent" and "value" are used, as it is said, as synonymous terms, but it cannot be concluded from thence that "value" is to be substituted for rent, and that those terms would have been used so loosely if the legislature had supposed that such a point would be raised. In the subsequent cases the Court finding those words loosely used in former Decrees, followed them.

Mr. *Richards* in reply. There is nothing peculiar in pleading a *modus*; the pleading of every custom is

(*a*) Ante, 36. (*b*) Ante, 88. (*c*) Ante, 103.

precisely

precisely the same, and a modus is only a customary payment. In all cases of custom or prescription, a grant or agreement is supposed; but whatever is in derogation of the general right must be stated precisely. The opinion of Lord *Chief Justice Eyre* was that a *modus* ought to be pleaded with much the same nicety as that or any other custom is pleaded in law: but before and since his time, the same strictness has not been considered necessary. But the custom must be averred in the answer, or the Court cannot proceed, and the objection is, that here is no custom pleaded.

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Though the right of the clergy of *London*, before this Act of Parliament, is very obscure, there was certainly a general right to Tithes previously; in the room of which this provision under the Act was substituted. The occupier must in his defence against the general right state the custom.

The Rector is not to shew that the occupier has not paid less than 2*s*. 9*d*; and the cause of *Bennett v. Trepass, (a)* the *Warden and Minor Canons of Saint Paul's*, and the other cases have been accordingly that the defendant set up a customary payment upon which he relied. In this answer there is no averment that these payments, which the defendants state were paid or payable at the time the Act of Parliament was made, stating only that in 1685 these sums were paid, and that the sums specified by the Statute were not paid; not carrying it back to the date of the statute; not averring that it was a customary payment. In *Bennett v. Trepass* particular sums were stated as customary payments. The dispute was as to the issue, which was very singular. Except that case and the *Warden and Minor Canons of Saint Paul's v. Morris (b)* in which Lord *Eldon's* opinion was, that the issue ought not to have been directed, there is no instance

(*a*) Ante, 125. (*b*) Ante, 169. in

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in which the particular thing has not been stated for the consideration of the Jury. The case of *Bennett v. Trepass* in anomalous, and throughout the other cause Lord *Eldon* constantly disputed the propriety of the issue. The defendants are pressed by the clause as to houses of noblemen, which cannot be accounted for upon any supposition, but that the owner of a house occupying himself was to pay; many clauses of the Act admit no other construction than that of the plaintiff. Rent is in many places used, as the medium through which the value is to be ascertained, and if no rent is actually reserved the payment must be upon the value.

The cases of *Williamson v. Gosling, (a)* following by *Bramston v. Heron, (b)* and *Kynaston v. the East India Company, (c)* sufficiently shew the construction that has been put upon this Act

The Master of the Rolls. The question in this cause is, in what manner the defendants are to pay Tithes for such of their houses and warehouses as lie in the parish of which the plaintiff is Rector. I do not find in the answer that there are any of the premises belonging to the defendants within this parish for which no Tithe is payable. In their schedule they represent some Tithe to be actually paid for every part of their property within the parish; where any Tithe is payable, it must be at the rate of 2*s.* 9*d.* in the pound of the rent or value, as the Statute may be construed; except where at the time the Statute was made a less sum had been accustomed to be paid: I say at the time of the Statute, as that is the proposition to be made, though it may be made out by evidence at a much more recent period.

When the defendants set up such customary payment as a bar to the demand of the full statutory

(*a*) Ante, 152. (*b*) Ante, 139. (*c*) Ante, 162.

Tithe,

Tithe, the usual course has been to direct an issue, whether that payment had had such an existence as brings it within the description of a customary payment, according to the true intendment of the Act: the defendants say such issue ought to be directed. That is opposed by the plaintiff maintaining that there is not in the answer an allegation of any specific customary payment, and consequently no foundation is laid for such issue. I am not aware of any case in which an issue has been granted, where the defendant did not specifically state what was the customary payment upon which he meant to insist. That is not done by this answer either directly or by reference. All the defendants say is, that to the best of their knowledge and belief, less sums than after the rate of £1 4*s.* ½ in 10*s.* or 2*s.* 9*d.* in the pound have been accustomed to be paid for and in lieu of Tithes of the said premises. In this part of the answer there is no reference to the schedule; what is here asserted might be perfectly true, though the payments had varied every year if they had not come up to 2*s.* 9*d.*

In the case of *Bennett* v. *Trepass*, that has been referred to, precise sums were stated as the customary payments upon which the defendant meant to insist; and those sums were afterwards found by a jury to be customary payments, within the meaning of the Statute; in the case of the *Warden and Minor Canons of St. Paul's v. Morris*, the defendants insisted upon payments rendered certain by reference to the paper, which they called the first or ancient rate.

They insisted that payments under that were ancient customary payments. Lord *Eldon's* objection to the issue, directed in that cause, seems to have turned upon

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upon this, that the defendants had set up one rate by their first answer, and a different rate by the answer to the amended bill and by their own cross bill; and, as the issue was directed in both causes, his Lordship thought, upon the whole record, no specific customary payment was set up; as two different payments were set up, the objection is as strong that here is no specific payment alleged; in that case the different payments destroyed the specification; in this, any specification is altogether wanting in the case of *Bramston* v. *Heron*, in which the allegation was much more specific than this, yet an issue was denied. They stated the clause in the Statute, and then said there were ancient payments made in the parish less than 2*s*. 9*d*. in the pound, and referred to an ancient record of 1629, in support thereof. The proposition in this answer that less payments than at the rate of 2*s*. 9*d*. in the pound have been accustomed to be paid, says nothing more than that the Tithe has not been paid at the rate of 2*s*. 9*d*. in the pound. This is perfectly immaterial unless you can shut out the claim to the full statutory Tithe; unless you can shew some specific customary payment that may be presumed to have had existence at the time the Statute was made: this is not done, and therefore the defendants have not entitled themselves to an issue.

Then no exemption being claimed, and no customary payment sufficiently alleged, the Rector is of course entitled to a Decree, at the rate of 2*s*. 9*d*.; but the question then arises upon how many pounds is the Tithe to be taken. These premises are not in lease, no rent therefore is reserved; all the property is in the occupation of the owners: upon what is the payment to be? the plaintiff says the Tithe of property in the occupation of the owner is to be paid upon the value of the premises to be let, or at least that must be the rule

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rule where the property does not exist in the same state in which it ever has been let: that is the case of all the property, none exists in the same form in which it ever paid rent; these buildings being all newly erected, the premises are materially altered: as to some, the rent last paid is known; as to others, that is not known. The defendants say, as to buildings standing upon the scite of those as to which the last rent is known, the payment is to be upon that last rent only: as to the others upon the scite of buildings, of which the last rent is not known, I understand them to say they are to pay no more than the Tithe, which may be presumed at 2*s.* 9*d.* in the pound upon the last rent. Upon the words it is more easy to contend that the owner of a house is not to pay any Tithe than that he is to pay according to the rent of the last house that stood upon the scite; for if rent is to be the criterion, how is the rent of one house a criterion for the Tithe of another, merely because a scite is the same? The two houses might be very different, and might be let at very different rents.

The expression of the Statute is, "that every owner "occupying himself shall pay after the quantity of "such yearly rent as the same was last letten for, "without fraud or covin." *(a)* The owner might say his house was never let, and therefore there being no rent at which it was last let, it is not liable to any Tithe, and it is difficult upon this clause of the Statute to maintain the claim of Tithe for new houses occupied by the owners. Yet it seems strange that the Rector entitled to Tithe for the old house, should lose his right to any Tithe merely because a new house has been built in its place, all other circumstances remaining precisely the same. The plaintiff contends that in cases to which none of the provisions

(*a*) Sect. 4.

of

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of the Statute apply; the Rector's claim rests upon the first general enacting clause, making all houses generally liable to Tithe. If the general object was to subject all houses, particular words are to be construed so as to give effect to the general purpose. With reference to that, there is no reason for the distinction between houses let and not let, that has been suggested, great incongruity would arise from that, and the words are large enough to include both. The express exemption of some houses that never have been let, forcibly implies, that if that exemption were not expressed, all houses, whether let or not, would be liable. But then the difficulty occurs, that the payment is to be according to the rent; therefore where there is no rent no Tithe is due. But upon the whole less violence is done to the Statute by construing the word "rent" in different senses, as it is used in different clauses, than by holding all houses that never were in lease to be out of the Statute.

But this is a difficulty with which I have not to encounter, for in this respect the construction is settled by decision; upon which "rent" means either actual rent or estimated rent, with reference to the value, according to the statute to which it is applied; and in opposition to that, there is nothing but a dictum of Lord *Coke*, *(a)* for it is not the points in the cause that where houses were not let, that is *casus omissus*, and no Tithe is payable. The first case referred to contains a general declaration as to the construction *Ivatt v. Warren*. The quetion was whether a house erected upon the scite of a shed which paid no Tithe, was liable to any Tithe. The defendant contended that the house was not liable to any Tithe; but, if that defence should fail, he set up a particular agreement for a composition. The Court declared that

(a) 2nd Institut. 660.

the

the meaning was that the inhabitant ought to pay according to the true value the same was worth to be let; and if the building had been a shed, it ought to be discharged no longer than it continued a shed; and being converted into a dwelling-house, it ought to pay Tithe, and the Decree was accordingly for 2*s.* 9*d.* in the pound with costs. In that case the proposition is laid down as to new built houses, where sheds formerly stood in general terms, without regard to the circumstance, whether the house was let or not, that the exemption allowed to the shed is at an end the moment the dwelling-house is substituted; that Tithe attaches upon it, as a dwelling-house; and it is not a necessary proposition that it should be let.

The case of *Grant v. Cannon, (b)* proves that in the occupation of the owner, the payment for Tithe is to be according to the value, admitted in that instance to be £60. per annum, the inquiry was directed at what rent the house had been last let, or what Tithe was last payable, but the declaration was, that the defendant must pay after the rate of 2*s* 9*d.* upon the value confessed in the answer. There are a great number of cases, in which the Decree has been expressed in these terms; that the defendant shall account and pay after the rate of 2*s.* 9*d.* in the pound for the yearly rent or value of their premises, I do not understand the Court to mean, that where there is a yearly rent, recourse shall be had to the value; but the meaning is, that the defendant is to account according to the rent if there is rent, and according to the value if there is no rent. Upon any other supposition it is very difficult to introduce the word "*value*" in such a number of Decrees, for that word is not in the Statute. The Court therefore introducing it in the Decree, understands the true construction of the Statute to be, that the word 'rent" may bear the double sense "reserved" or "estimated" rent.

(*b*) Ante, 107.

The

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The case of *Williamson v. Gosling*, is precisely in point; that case like this arose upon new buildings erected upon the scite of old houses. The defendant set up a customary payment to protect himself from claim of the full Statutary Tithe; he established that as to three of the old houses, and the Court seem to have held, that a customary payment protected any houses upon the same scite, as the premises were altogether out of the Statute, if any customary payment at the time of the Statute was established. The defendant failed in establishing any customary payment as to the fourth house. Then, according to what is now contended, the question would have been at what rent that fourth house was last let, and the payment ought to have been accordingly, but no such inquiry was made, for the Court immediately decreed that the defendant should account and pay at the rate of 2*s.* 9*d.* in the pound for the premises where the old house once stood according to the yearly value; and took it so clear that the Decree was made against the defendant with costs. There is no distinction between that case and this. Upon all the ground occupied by the defendants buildings of some description formerly stood. Of some the former rent is known, as to others it is not known. But that is not the point of the inquiry according to this Decree. The point is, what is the value of the buildings erected in lieu of those which formerly stood there. If the Statute had not received a construction, I should have thought it necessary to put the construction upon it, in order to make it consistent; but if I had any doubts, these authorities would have overruled them.

The Decree was made for payment at the rate of 2*s.* 9*d.* in the pound upon the value, and a reference to the Master was directed accordingly.

House of Lords,

ENGLAND.

APPEAL

FROM THE

COURT OF CHANCERY.

EAST INDIA COMPANY, . . . *Appellants.*
ANTROBUS, ... *Respondent.*

DOW. 464.

BILL filed for tithes in *London* at 2*s.* 9*d.* in the pound, under 37 *Hen.* 8. cap. 12. in respect of buildings belonging to the *East India Company*. No present rent paid; rents and tithes paid at various times since 1660 for some of the buildings that formerly stood on the site of the present buildings set forth, and as to other former buildings no rents nor payments of tithes could be shewn. No specific invariable customary payments alleged, and none of the stated payments carried up to the time of act 37 *Hen.* 8. cap. 12. decreed, that these messuages, warehouses, &c. ought to pay 2*s.* 9*d.* in the pound according to improved value, and this affirmed in the last resort upon appeal.

Dec. 14, 1812

Dec. 14, 1812.

The East India Company v. Antrobus. Bill filed *Dec.* 31, 1801.

The respondent, a rector of the parish of *St. Andrew Undershaft* with *St. Mary Axe* annexed, filed his bill against the appellants for the recovery of tithes for certain messuages and premises held and occupied by them within the said parish.

The bill after stating the tithe of the respondent, reclied the decree of the Archbishop of *Canterbury* of the 23d of *February*, 1545, ordering payment of tithes by the citizens of *London*, at the rate of 2*s.* 9*d.* in the pound. And the statute 37 *Hen.* 8. cap. 12. pursuant to which that decree was made. It then stated that the *East India Company* before, in, and since the year 1800, had been and then were in possession of certain messuages in the said parish, and prayed for an account and payment after the rate mentioned in the act and decree.

Answer.

The answer stated that no rent was reserved for the buildings and premises in their occupation, but that rent had been paid for some other buildings which formerly stood on part of the ground on which the buildings occupied by them had been erected; that they had in a schedule annexed to their answer, set forth an account of the several rents, as far as they had been enabled to ascertain them, to show that less sums had been accustomed to be paid than after the rate mentioned in the act and decree, and that rents ought to have been received for all the houses, &c. which had before stood on all the other parts of the ground on which the buildings now occupied by the appellants were at present situate, but that they neither knew nor admitted the same, and left the respondent to bring such proof thereof as he could. The answer then stated in detail such rents and tithes as had been paid for the *Old East India House* in 1660, and

and for all the buildings subsequently purchased at various times that stood on the site of the *present East India House* and premises in the said parish, occupied by the appellant as far as they knew the same. And the appellants further stated, that to the best of their knowledge and belief, less sums than after the rate aforesaid had been accustomed to be paid for the houses, &c. which had formerly stood on the site of their present premises, and they submitted that they were therefore entitled to the benefit of the provision in the act in regard to customary payment.

Less sums than after the rate of 2s. 9d. in the pound, alleged to have been accustomed to be paid for houses which formerly stood on the present buildings.

But no specific constant uniform customary payments were alleged, and none of the payments stated were carried so far back as the date of the act and decree.

No specific invariable customary payments alledged, and none of those stated carried so far back 37 H. 8.

The cause came on to be heard before the *Master of the Rolls*, who, on the 21st of *July*, 1806, made a decree, declaring that the respondent was entitled to tithes after the rate of 2s. 9d. in the pound, on the annual value of the messuages, warehouses, &c. in the pleading mentioned, and ordered a reference to the master, to ascertain such annual value, &c.

July 1806. Decree ordering payment at rate of 2s. 9d. in the pound, according to improved value.

From this decree the appellants appealed, contending that according to the true construction of the Act 37th *Henry* 8, cap. 12, the respondent was entitled only to such less sums than 2s. 9d. in the pound as had been accustomed to be paid, or at least that an issue ought to be directed to try the question as to such customary payments, that where the last rents of houses formerly standing on the site of the present buildings were known, but no customary payments proved, the tithe ought to be calculated according to the last known rent, and not upon the improved value, and that where no last rents were known, no tithe ought to be paid.

The

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The Lord Chancellor. Suppose several houses pulled down, some of them exempt for customary payments, others not; and one house built instead; how was that house to pay? was there any case?

Mr. Leach believed the point had occurred in a late case at the *Rolls*, (not reported) *Brumston v. Flabber*, an issue was directed to try whether, under these circumstances, any customary payments should be sustained as to the new house, and the verdict was against the customary payments.

(N. B. It afterwards came out, that the point had not been there decided as it appeared at the trial that the new house had actually paid at the rate of 2s. 9d. in the pound on the value.)

Mar. 22, 1813. Judgment.

Lord Eldon (Chancellor). After a review of the enactments in the statute, and of the cases decided under it, stated it to be his opinion, that where no rent was shown, the payment must be according to the value, and as to the pleadings, it was not sufficient to say that less sums than 2s. 9d. in the pound had been accustomed to be paid, but it was necessary to alledge what those payments were, without throwing the burden of proof on the clergyman, and if that was the case, in regard to a single house, it was so much the more in regard to this mass of houses. He was of opinion, upon the pleadings alone, that the judgment of the court below was correct. *(a)*

Decree of court below *affirmed.*

Mar. 22, 1813. The East India Company v. Wightwick, Same v. Johnes.

Two other appeals, one from the Court of Exchequer *(East India Company v. Wightwick)* the other from the Court of Chancery *(East India Company v. Johnes)* respecting certain premises belonging to the Company in the parishes of *St. Botolph Aldgate*, and *Allhallows Barking*, in which similar judgments had been given in the courts below, were heard at the same time; and the decrees likewise *affirmed.*

(a) 13 *Ves. jun.* 9.

EXCHEQUER.

IN EQUITY.

Coram RICHARDS, LORD CHIEF BARON.

4 Price 65.

THE WARDEN AND MINOR CANONS OF ST. PAUL'S *v.* THE DEAN OF ST. PAUL'S.

The Dwelling-house, &c. of the Deanery of *St. Paul's* in *London* is not exempt from the payment of Tithes to the Warden and Minor Canons under the 37th *Hen.* 8, c. 12.

The rate according to the amount of which the payment for such Tithes is to be computed at 2s 9d. in the pound on the fair yearly rent or actual annual value of the premises be let, as in the case of all other houses paying Tithes.

The maxim *ecclesia ecclesiæ decimas solvere non debet*, does not apply to the circumstances

THE original bill stated letters patent of King *Henry* the sixth, dated the 22d *November*, in the 24th year of his reign, whereby he gave licence to the dean and chapter of the cathedral church of *St. Paul*, *London*, and their successors, to appropriate the church of *St. Gregory*, in the city of *London*, then in the patronage of the dean and chapter, and held of his majesty in pure and free alms, to the use and benefit of *John Good*, the then warden of the college of the twelve minor canons of the said cathedral, and the canons of the said college and their successors for ever. The bill further stated, that the appropriation was duly made, whereby the warden and minor canons became, and had ever since been the parson and proprietors of the said church, and as such, entitled to all the tithes, &c. growing due within the parish. The bill then stated the decree, dated the 23d of *February*, 1545, made in pursuance of the act of parliament (*a*), "for tithes in *London*,

(*a*) 37 *H.* 8. *c.* 12.

under which the Dean of St. Paul's is connected with the Warden and Minor Canons as Parson of St. Gregory. It is confined to the Clergy of the *same Church*.

The Dean is not within the meaning of the exemption of the act of a Great Man.

Where there has been no new Lease granted for many years, the Clergy of *London*, are to be paid for their Tithes, on the expiration of the old one, according to the improved annual value; and when any fine is paid on taking a new Lease, in consideration of which the annual rent is reduced, the amount of such fine is to be taken into the calculation of the estimate of the yearly value—new Houses on old sites are liable according to the actual value.

Where a general act of Parliament confers immunities which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law, *expressio unius est exclusio alterius*.

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London, by which decree it was ordered (*a*), "that the citizens and inhabitants of the city of *London*, for the time being, should yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars and curates of the said city and their successors for the time being, after the rate following: For every 10*s.* rent by the year of all houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty thereof, 16½*d.*, and of every 20*s.* rent, by the year, 2*s.* 9*d.* and so above the rent of 20*s.* by the year, ascending from 10s. to 10*s.* according to the rate aforesaid: and that where less sum than 16½*d.* in the 10*s.* rent, or less sum than 2*s.* 9*d.* in the 20*s.* rent, had been accustomed to be paid for tithes, then in such places the said citizens and inhabitants should pay but only after such rate as had been accustomed." The bill also stated the act (*b*), for rebuilding the city of *London*, which united the parishes of *St. Mary Magdalen Old Fish Street*, and *St. Gregory*, and the act (*c*), fixing the tithes of those two parishes at £120; but those acts saving expressly the right of the warden and minor canons, parson and proprietors of the rectory of *St. Gregory*, to receive all tithes, &c. within that parish as before. The bill further stated, that the defendant, as dean of *St. Paul's*, had been in every year since 1792, in the possession and occupation of a certain dwelling-house with various buildings and appurtenances, within the rectory of *St. Gregory*, or the titheable places thereof, being the deanery house belonging to the deanery of *St. Paul's*, for which house, &c. tithes, or yearly payments in the nature of tithes were payable in manner directed by the act of 57 *Hen.* 8, and the decree, according to the full value thereof to be let by the year; and the bill prayed an account and payment of tithes for the said dwelling

(*a*) *Sect.* 2.
(*b*) 22. *Car.* 2. c. 11.
(*c*) 22 & 23 *Car.* 2. *c.* 15.

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dwelling-house, buildings and premises, from *Michaelmas* 1792, after the rate of 2*s.* 9*d.* in the pound, on the full value or worth of the premises to be let by the year.

The defendant by his answer stated his belief, that from time whereof the memory of man is not to the contrary, the dean of *St. Paul's* had been seised in his demesne as of fee, in the right of his deanery, of a certain piece of ground on which the deanery or house of residence of the dean in right of his deanery formerly stood, and on part of which the present deanery-house with part of its appurtenances now stands:—that some time during the rebellion in the time of King *Charles* the first, the mansion-house and buildings belonging to the then dean in right of his deanery, were pulled down and destroyed, and divers small tenements, &c. were afterwards built upon the site or some part of the site of the mansion-house and buildings, which small tenements, &c. were afterwards let; and that in or about the year 1666, the whole of such small tenements, &c. were destroyed in the great fire of *London:* that in or about 1670, Doctor *Sancroft*, the then dean, applied to parliament for leave to build a mansion-house with suitable out-buildings, &c. for the use of himself and his successors the future deans, upon part of the site of the old deanery, and for leave to demise the residue of the site of the old deanery: and that accordingly by an act passed in the reign of King *Charles* the second, and in the year 1670, it was enacted, that after the dean had set out a proportion of the site of the old mansion-house, and of the out-houses, &c. thereunto belonging, as by the lord chancellor, or lord keeper, and the bishop of *London* for the time being, should be judged meet and convenient for the building of a new mansion-house for him and his successors, and should be so declared in writing, attested under their hands and seals, it should be lawful for the

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dean, at any time before the 24th of *June*, 1672, to demise the residue thereof for the term of 60 years, reserving such yearly rent or rents as by the lord chancellor or lord keeper, and the bishop of *London*, for the time being, should be directed or appointed: and from and after the expiration, or other sooner determination thereof, it should be lawful for the dean and his successors for ever thereafter, to demise the residue of the said site for the term of 40 years, under the rent or rents appointed to be reserved as aforesaid, or more; with a proviso, that before the dean should make any lease by virtue of the act, he should give such security as the lord chancellor, or lord keeper, and the bishop of *London* for the time being should approve, to expend a sum of money in building upon the ground aforesaid, a convenient house for himself and his successors. The answer further stated an instrument under the hands and seals of lord keeper *Bridgeman*, and *Humphrie*, bishop of *London*, dated the 19th *December*, 1670, whereby, after reciting that Doctor *Sancroft*, in pursuance of the act, had set out a proportion of the site of the old mansion-house, and of the out-houses, &c. thereunto belonging, for the purposes mentioned in the act; and after particularly describing the proportion of the site to set out by metes and bounds, the lord keeper and the bishop did thereby judge the said proportion of the site of the old mansion-house, and of the out-houses, &c. thereunto belonging, as before described and mentioned to be so by the dean set out, to be meet and convenient for the building of a new mansion-house for him and his successors, according to the act: and they further directed that the yearly rents by the dean to be reserved for the residue of the site upon the leases to be made by him in pursuance of the act, should in the whole amount to £12. The answer further stated, that a proper security, as required by the act

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act, was given by Dr. *Sancroft*, for the purposes in the act mentioned; and that certain leases were granted by him in pursuance of the act, and of the direction and appointment of the lord keeper, and the bishop of *London*, of the residue of the site of the old mansion-house, and of the out-houses, &c. thereunto belonging, a certain proportion of the site having been so set out by Dr. *Sancroft*, for the erecting the new deanery house. The answer further stated the defendant's belief, that Dr. *Sancroft*, the then dean, erected the new deanery house and the out-houses, &c. belonging thereto, upon that part or portion of the site of the old mansion-house, so set out in pursuance of the last-mentioned act, and that the deanery house so rebuilt by *Dr. Sancroft*, is the present deanery house, and that the same, and the buildings, gardens, and yards belonging thereto, stand upon the same site (being part of the site of the old deanery) as was so set out by the lord keeper and the bishop of *London*, and built upon by Dr. *Sancroft*, with the additions mentioned in the subsequent part or the answer.

The answer further stated the defendant's belief, that from time whereof the memory of man is not to the contrary, no tithes, or any pecuniary payments whatsoever in the nature or in lieu of tithes, were ever paid or were of right due or payable, or ought now to be paid or made to the warden and minor canons for the time being of the said cathedral, or the rector of the rectory of *St. Gregory*, or of the united parishes of *St. Mary Magdalen Old Fish Street*, and *St. Gregory*, or to any other person, for or in respect of the deanery house of the cathedral church of *St. Paul's*, and the premises thereto belonging, of which the dean of the said cathedral church hath been seised during the time aforesaid, or of any part thereof, for so long as they

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remained in his own tenure and occupation: and that the defendant doth now occupy, and ever since he was presented or appointed to the deanery in the year 1787, hath occupied, as dean of *St. Paul*'s, the said deanery house with the out-buildings, &c. thereto belonging: and that the present deanery and the premises thereto belonging, consist of the premises which were so set and marked out by the lord keeper and the bishop of *London*, with the additions after-mentioned, (that is to say) such part of the garden of the present deanery as is after-mentioned, formerly belonged to a certain tavern formerly called the *Feathers*, and which the defendant believed was added to the garden belonging to the deanery, soon after the time of building such deanery; and that part of the present court-yard and garden of the deanery consists of the former sites of four shops or sheds, and of three houses in *Scollop Court*, which the defendant believed were also added thereto at the time after-mentioned. The answer then stated an indenture, dated the 20th *June*, 1683, between *Nicholas Pedley* and *Henry Mortlock*, of the one part, and Dr. *Stillingfleet*, then dean of *St. Paul*'s, and the chapter of the same church of the other part, whereby, after reciting a conveyance in fee, dated the 19th *June*, 1668, from the archbishop of *Canterbury*, to *Pedley* and *Mortlock*, of the toft, soil, or parcel of ground, whereupon before the fire of *London*, stood a tavern called the *Feathers*, situate in *St. Paul*'s church-yard, in consideration of £325, expressed to be paid by *Fedley* and *Mortlock* to the archbishop:—and further reciting, that the conveyance was made to *Pedley* and *Mortlock*, in trust for Dr. *Stillingfleet*, and that the £325 paid for the purchase, was his proper money: and that Dr. *Stillingfleet* had laid and taken in part of the said ground unto other ground belonging to the deanery house and thereto adjoining, designed for and then

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then made a garden, to make the said garden ground straight and uniform, and to prevent annoyances and other inconveniences to the mansion-house of the deanery; and that the residue of the ground so purchased, together with a small parcel of ground belonging to the deanery, lying westward, and extending north behind the ground so purchased, was united and built upon by agreement between Dr. *Stillingfleet* and the chapter of *St. Paul*'s, there then being four single houses erected, with an entry leading unto them from *St. Paul*'s church-yard, and a yard and other passages and conveniences allotted and set out for the said four houses: it was witnessed that Dr. *Stillingfleet* acknowledged to have received from the chapter the said sum of £325, which was by him paid for the purchase of the ground: and that *Pedley* and *Mortlock* should stand seised of the premises, upon trust that Dr. *Stillingfleet* and his successors, deans of *St. Paul*'s, should for ever enjoy all that part, and so much of the premises as was then divided from the residue thereof, and laid on to the ground designed for and then made a garden for the mansion-house of the dean and his successors, and then in his actual possession; and as to the residue of the purchased premises, upon such trusts, &c. as the dean and chapter should appoint.

The answer further stated the defendant's belief, that subsequently to the time when the ground, formerly part of the *Feathers Tavern*, was so added to the garden belonging to the deanery, and for very many years last past, down to the year 1779, the sum of 12*s.* 6*d.* had been paid by the defendant's predecessors, to the warden and minor canons for the time being, for or in lieu of the tithes of the piece of ground so added to the garden; and that since the piece of ground formerly belonging to the *Feathers Tavern*, was so taken

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so taken in and added to the garden of the deanery, the said piece of ground had never been letten: and the defendant insisted, that for the reasons after-mentioned, the said annual sum of 12*s.* 6*d.* cannot now be increased, diminished, or varied. The answer further stated the defendant's belief, that it appears from certain rate-books belonging to the plaintiffs and their predecessors, that for many years back, down to the year 1769, and from thence down to the year 1779, the said yearly sum of 12*s.* 6*d.* was paid by the respective deans for the time being, to the warden and minor canons for the time being, for and in respect of certain tithes which in the said books are stated to have been "*for the tithes of the said deanery*, but which the defendant believes were *for such part of the said deanery only as was so added to the garden thereof in the year* 1683; and that such entry ought not in any manner to prejudice the defendant and his successors. The answer further stated the defendant's belief, that the said annual sum of 12*s.* 6*d.* was collected by half-yearly payments, by or on behalf of the warden and minor canons, from the respective deans for the time being, for or in respect of such tithes, and that immediately or shortly after the year 1769, the tithes which were due to the warden and minor canons, in respect of four shops or sheds adjoining to the premises belonging to the deanery, and which, as the defendant believed, were at that time taken into the occupation of the then dean and added to the court-yard, were for the first time charged upon and collected half-yearly from the dean and his successors, after the rate of 1*s.* 4*d. per annum*, for each of the said four shops or sheds; which said sum of 12*s.* 6*d. per annum*, and 1*s.* 4*d. per annum* each, for the said four shops or sheds, made, in the whole, the annual sum of 17*s.* 10*d.* which was collected by half-yearly payments of 8*s.* 11*d.* each from the dean, from the year 1769 down

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down to the year 1776: that in the year 1776, the tithes which were due to the warden and minor canons for three houses situate in *Scollop Court*, and which were, as the defendant believed, about that time taken into the occupation of the then dean and made a part of the deanery, were for the first time charged upon and collected half-yearly from the then dean, and his successors, and from the defendant down to the year 1792, after the rate of 2*s. per annum* for each of the three houses, and which several sums of 12*s.* 6*d. per annum*, 1*s.* 4*d. per annum* each for the said four shops or sheds, and 2*s. per annum* each for the said three houses, made in the whole the annual sum of £1 3*s.* 10*d.* which was collected by half-yearly payments of 11*s.* 11*d.* from the deans, in and after the year 1776 down to the year 1779, from which period down to the year 1792, as the defendant believed, from mistake or accident, the annual sum of £1. 5*s. per annum* was illegally and improperly collected by or on behalf of the warden and minor canons, instead of the aforesaid yearly sum of 12*s.* 6*d.* for or in respect of the tithes of such part of the deanery as aforesaid, exclusive of the four shops or sheds, and of the three houses in *Scollop Court;* and the defendant insisted, that as dean of *St. Paul's*, he is, and all other deans of the said church are entitled to hold the said premises part of the site of the ancient deanery so set out by the lord keeper and the bishop of *London* for the site of the present deanery, and all erections and buildings thereon, freed and exempt from all and all manner of tithes and payments or compositions in lieu thereof, whilst the same shall be in the tenure and occupation of the dean of such church for the time being.

The answer then stated, that by the decree of the 23d *Feb.* 1545, it was amongst other things ordered and decreed

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decreed (*a*) "that every owner or owners, inheritor or inheritors of any dwelling-house, or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and liberties, *inhabiting or occupying the same, himself or themselves*, should pay after such rate for tithes as thereinbefore mentioned, *after the quantity of such rent as the same was last letten for*, without fraud or covin." The answer then stated the defendant's belief, that for many years previous to the year 1779, and from the time when such land, formerly part of the *Feathers Tavern*, was added to the new deanery, the before-mentioned annual sum of 12*s.* 6*d.* only was paid to the warden and minor canons, which the defendant believed was paid for such addition as aforesaid, and that when four shops or sheds, and the three houses in *Scollop Court*, were added to the deanery, such addition of 1*s.* 4*d.* for each shop, and 2*s.* for each house was made, and that no other payments had at any time, to the defendant's knowledge, been made for any part of the said premises, except such annual sum of 12*s.* 6*d.*: which annual sums of 1*s.* 4*d.* each, and which three annual sums of 2*s.* each, make together £1. 3*s.* 10*d.* save and except, that from the year 1779 to 1792 such annual sum of £1. 5*s.* was paid instead of the annual sum of 12*s.* 6*d.* as aforesaid, which the defendant believed was done by mistake: and that the premises for which sums were so paid as aforesaid, had never been letten since the same were taken into and made part of the deanery: and the defendant therefore submitted and insisted that the same must be presumed to have been assessed according to the rent at which the said premises were last letten, without fraud or covin, before the same were taken into and made part of the deanery, and

(*a*) *Sect.* 4.

and could not therefore be raised until the said premises should be again letten.

The answer further stated, that in case the court should be of opinion that the part of the deanery which stands upon such part of the ancient site as was so set out by the lord keeper and bishop of *London*, is not exempted from paying tithes by such prescription as aforesaid, or as being the ancient possessions of the deanery, and which the defendant therefore submitted, was even without any prescription, not liable to pay tithes when in the hands and occupation of the dean: yet that it was by the said decree provided (*a*), "that the said dues should not extend to *the houses of great men, or noblemen, or noblewomen*, kept in their hands and occupation, and not letten for any rent, *which in times past had paid no tithes*, so long as they should continue unletten:" and he submitted, that the dean is a *great man* within the meaning of such decree, and that under the circumstances aforesaid, so much of the ancient site of the deanery as was so set out by the lord keeper and bishop of *London*, is therefore exempt from the payment of tithes: but that if such ancient site was not absolutely exempted from the payment of tithes in manner aforesaid, yet that the deanery was the residence of the dean for the time being, and as the defendant believed had not, (except the messuages and sheds and three dwelling-houses lately taken in as aforesaid) been demised or let since the erection thereof by Dr. *Sancroft;* and that no further or other sum than 12*s.* 6*d. per annum* was paid in respect of the tithes of the deanery or any part thereof (including that part of the garden which was formerly part of the *Feathers Tavern*) from the time of such erection till the times when such shops or sheds were

(*a*) *Sect.* 16.

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were added to it as aforesaid, upon which occasion, and on the occasion of such three houses being added to the same as aforesaid, such additions were made to the same as aforesaid, and that no other alterations or additions were ever made in or to such payments except as before-mentioned; and therefore the defendant submitted and insisted, that in case the court should be of opinion that the deanery, out-buildings, and premises thereto belonging (save and except such parts thereof as are before in that behalf excepted) are not exempt from the payment of tithes to the warden and minor canons, then, that under the circumstances aforesaid, it ought to be presumed that the said annual sum of 12*s.* 6*d.* was the proper sum to be assessed upon the deanery and its appurtenances as marked and set out by the lord keeper and bishop of *London*, and the premises part of the *Feathers Tavern* as added thereto, for or in respect of the tithes thereof due to the warden and minor canons, after the quantity of such yearly rent as the said small tenements or dwelling-houses and shops which were built upon the site or ground where the ancient deanery stood, were last letten for without fraud or covin: and the defendant therefore submitted, that the plaintiffs had not any right to demand any further or other payment from the defendant in respect of the tithes of the premises belonging to the defendant in right of the said deanery, exclusive of the four shops or sheds, and the said three houses in *Scollop Court*, save and except the said annual sum of 12*s.* 6*d.* unless the said premises, exclusive of the four shops or sheds, and the three houses, aforesaid, should be again let.

The answer farther stated the defendant's belief, that for very many years back, and as far as any trace could be found of any payments in the nature of tithes having been ever made in respect of the deanery, or any part thereof

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thereof, down to the year 1779, no other payment or annual sum, save and except the said sum of 12*s.* 6*d.* was ever made to the warden and minor canons, for or in respect of tithes of any part of the deanery, exclusive of the said four shops and three houses: and that although from the year 1779 down to the year 1792, the annual sum of £1. 5*s.* appeared to have been paid to the warden and minor canons in respect of the deanery, exclusive of the four shops and three houses aforesaid, yet the defendant insisted, that the dwelling-house and premises belonging to the deanery, were not let in the year 1779, or about that time or subsequent thereto: the defendant therefore insisted, that as no new letting over took place, the warden and minor canons had not any right to increase the said annual sum of 12*s.* 6*d.* to the said annual sum of £1. 5*s.* or to any other larger sum than the 12*s.* 6*d.* and that such increase or additional payments (beyond the said annual sum of 12*s.* 6*d.*) as took place between the years 1779 and 1792, were illegal and could not be supported: or that in case they could be supported upon the presumption that they were warranted by some evidence having been discovered of what was the last rent for which the said small tenements or dwelling-houses and shops so erected and built upon the site of the ancient deanery, and afterwards burnt down as aforesaid, were last letten for, without fraud or covin; yet that if such last-mentioned presumption could arise and be supported, and if the plaintiffs should be able to produce any evidence from which such presumption might be warranted, then the defendant insisted, that the plaintiffs were not entitled to demand or take more than the annual sum of £1. 5*s.* in respect of the tithes of the deanery, exclusive of the four shops and three houses in *Scollop Court*; and that in all events the plaintiffs were

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were not entitled to demand or take any sum of money whatsoever in respect of the tithes of the said deanery, for more than six years immediately preceding the filing of their bill; and the defendant, for the reasons and under the circumstances before-mentioned, insisted that he ought not to pay tithes or any sums of money in the nature of tithes, in respect of the premises belonging to him in right of the said deanery, according to the present improved value thereof.

It was charged by the amended bill, that divers letters had passed between the plaintiffs and their solicitors and the defendant, touching the plaintiffs' demands on the defendant for tithes, by which it would appear, that the defendant promised and undertook to pay the plaintiffs their full demands for tithes, as soon as the questions then litigating between the plaintiffs and certain others of the parishioners, touching the rights of the plaintiffs to be paid 2*s.* 9*d.* in the pound were settled: and the amended bill charged, that their right to take 2*s.* 9*d.* had been finally and fully established, and that it was upon the faith of such promise the plaintiffs omitted to make the defendant a party to the said suit: and that the plaintiffs' demand for the arrears of tithes due from the defendant, ought not to be limited to six years, but that they ought to be paid such arrears for the time in respect whereof they recovered tithes from the defendants in the aforesaid suit, and during the whole of the period from thence up to the present time.

To this the defendant answered, that not having kept copies of such letters as were written by him previously to the final decision of the other suit mentioned in the bill, and which was finally decided in the house of lords, in favour of the plaintiffs, on the 20th *April*, 1809,

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1809, he could not set forth with certainty, whether he thereby promised to pay and satisfy to the plaintiffs their full demands upon him for tithes, as soon as the suit then depending between the plaintiffs and certain other parishioners respecting the plaintiffs right to be paid 2*s.* 9*d.* in the pound was determined; but the defendant thought he never made any such promise: and that if he did in any of such letters make any acknowledgement of the alledged right of the plaintiffs, or any promise to pay them their full demand for tithes, yet he submitted and insisted, that by the words 'full demands' if any such words were used, must be intended their full legal demands, and not such demands as the plaintiffs had no right to make, or any means to establish against the defendant and his successors; and that even if he had promised to pay the plaintiffs their full demands in the most unqualified manner, and without any regard to the circumstance of those demands being legal or illegal, yet that such promise being made by the defendant when he was ignorant of his own rights, and under a misconception arising from a knowledge that the sums set forth in his answer had been in fact paid, without knowing exactly at the time, in respect of what part of the premises whereof the deanery now consists, such payments were made or how they arose, the supposed promise could not be insisted upon or set up as an acknowledgement of the plaintiffs' alledged right to enforce payment of tithes against the defendant in respect of the deanery, after the rate of 2*s.* 9*d.* in the pound according to the full improved value thereof: and such letters being also written under terms of compromise, the defendant insisted that they could not be received in evidence against him touching the question in this cause.

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The letters referred to were dated *May* 1, 1809, and *May* 5, in the same year. The first contained the following passage: 'Not long since, a communication was made to me upon the subject by Mr. *Moore*,' (the warden) 'and I was then advised to wait till the decision of the house of lords, to which the minor canons acceded.' The other letter acknowledged that a proposal was made to the defendant by the plaintiffs in *May*, 1807.

The case, having been argued by *Wetherell* and *Hall* for the plaintiffs, and *Dauncey* and *Spranger*, for the defendant, stood for judgment.

RICHARDS Ch. B. This is a suit instituted by the warden and minor canons of *St. Paul's* as parson of the parish of *St. Gregory*, in the city of *London*, against the bishop of *Lincoln*, in his character of dean of *St. Paul's*, for tithes, under the statute of *Henry* 8, which relates to the city of *London*. That the statute is a general statute, is admitted on all sides, and that regularly it gives the parson of the parish the tithes which belong to every house: and it is incumbent upon him who declines payment of tithes, to shew his exemption under some customary payment. It is also admitted, that the deanery of *St. Paul's*, is within the parish of *St. Gregory*, and therefore according to the acknowledged law, the dean of *St. Paul's* is liable to the payment of tithes for the house called the *Deanery*, unless he can shew some legal excuse for not paying them. The defences which are made are several, and certainly not consistent with each other. The first defence is independent of the statute. It seems that the parsonage

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parsonage of *St. Gregory*, once belonged to the dean of *St. Paul's*, and that it was granted by him sometime in the reign of *Henry* the sixth to the warden and minor canons: that circumstance is relied upon in some measure as shewing a connection between the dean and the living, and is used to shew a ground for a presumption, that there might have been some contract between the dean who granted the benefice, and the parson who took it, in order to excuse the dean from the payment of tithes. However, there is no trace of such a contract, and without any evidence on the subject, the dean of *St. Paul's* is to be considered as any other person occupying, unless he has some exemption personal to himself. It is then said, that independent of the statute, he has another title to exemption, namely, that he is an ecclesiastical person, and that the deanery is part of his possessions as an ecclesiastical person, and allusion is made to the maxim *ecclesia decimas non solvit ecclesiæ*. With respect to that, it seems to me that the act of parliament has charged every house in the parish except the houses which the act itself has excepted, and that certainly is the general notion, for in a very early case, *Green* v. *Piper* (*a*), it was held, that a house in *London*, belonging to a priory that was discharged of paying tithes of its possessions, yet by the statute of 37 *Henry* 8. *c.* 12, should be charged for tithes according to the ordinance there, for before that statute, the case says, no dwelling-house was chargeable for tythes, because no profit ariseth of it, and that only noblemen's houses are excepted. By noblemen's houses must be meant that rank of houses which are excepted afterwards in the act. In respect therefore of

No house is exempt from paying tithes under 37 *H.* 8. c. 12. except the houses expressly exempted by the act.

(*a*) *Ante* 34.

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of the circumstance of the dean of *St. Paul's* being an ecclesiastical person living in the parish, and being called upon to pay tithes, for premises occupied by him in the parish, it appears to me that the act of parliament does not at all discharge him, or diminish his liability to pay tithes. It is not necessary now, to enquire how tithes in *London* were paid before (if any tithes were paid) or how ecclesiastical persons, ministers of churches, were provided for. This act is the *magna charta* of the clergy of *London*, and it affects persons who occupy houses in her parishes just as much as the common law gives the tithes to the rector of a common parish. The maxim *ecclesia decimas non solvit ecclesiæ*, cannot, I conceive, in it's general acceptation, apply to any case but that of rector and vicar: it is that the same *ecclesia* shall not pay tithes to itself. Where the tithes are distributed between the rector and vicar, and the vicar is in possession of glebe, or the rector is in possession of glebe, the tithes shall not be paid to the rector, or to the vicar, as the case may be; but in other cases I take it to be very clear, that an ecclesiastical person cannot decline by law the payment of tithes unless he prescribes in *non decimando*, as an ecclesiastical person may; the case of *Blincoe* v. *Barksdale* (*a*) quoted by *Mr. Spranger*, was a case of parson and vicar, and all the authorities will, I believe be found to apply only to cases of that description. It is so stated in *Watson's Complete Incumbent* (*b*), and the author adds, 'If the parson's or vicar's glebe be in another parish than where the church is to which it belongs, tithes of such glebe shall be paid to the incumbent of the church where the glebe is, unless the parson or vicar to whom the glebe belongs can prescribe in *non decimando*:' he collects it from the cases to which he

The maxim *ecclesia decimas non solvit ecclesiæ*, applies only between rector and vicar of the same parish.

(*a*) *Cro. Eliz.* 573. (*b*) 513, 514.

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be refers and which I have frequently had occasion to consider. There is no doubt that the glebe of one clergyman which happens to be in the parish of another, is liable to pay tithes to the latter; and as between the rector and vicar, if the rector or vicar lets his glebe to another person it must pay tithes; it is, as I conceive, a privilege confined precisely to the parish in which the property lies; but that is not necessary to be decided here, because I am clearly of opinion that the maxim cannot apply in this case under the act of parliament, for the act itself has pointed out where the exemption shall be, and by making the exemption, it certainly denies any exemption to any part of the parish but that which it excepts: besides, there is, as we shall find presently, another answer which is quite decisive, when we consider the claim of a total exemption or discharge from tithes, we shall find the deanery has paid tithes beyond all question; this is independent of the statute. The defence then takes up the statute, and says I am exempted by the very words of the statute; if so, there is an end of the case. The defence is under the sixteenth section, which provides, that the decree shall not extend to the houses of great men, or noblemen, kept in their own hands, and not letten for any rent, *which in times past had paid no tithes*, so long as they should so continue unletten, nor to any halls of crafts or companies, so long as they be kept unletten, so that the same halls in times past had not used to pay any tithes. In the first place, it would be necessary, in order to bring the defendant within the proviso, to shew that he had never paid any tithes in ancient times; that however is disproved; but independent of that, the question is, whether the dean of *St. Paul's* is within the intent of this act of parliament, what is called *a great man*. I have not been able to find any case upon the construction of the act with respect to the words

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words *great men*, but I find that almost all the cases refer to noblemen, as forming the class of persons excepted by the act of parliament; I confess, I cannot help thinking with Mr. *Hall*, that the order of the words shews, that they must be great men, superior to noblemen or noblewomen, for we know, that according to the rules of compisition, things are to be stated in their proper order, and when I see noblemen or noblewomen, aud afterwards halls, crafts, and companies, I incline to think according to Mr. *Hall's* argument, that great men must be persons superior to noblemen and noblewomen, but there has been no case cited in which a dean has been considered as a great man within this act of parliament. A person may be of very high rank without being a peer, and we know that when this act was passed, it was much more usual for persons of rank to reside in the city of *London* than it is at present: it was no uncommon thing for the nobility to live in the city at that time. The object is, that wherever great men, or noblemen, or noblewomen, reside in houses that have paid no tithes, they shall not be subject after that act passed, but then it must be shewn that they never paid tithes before. The act then refers to commerce, and mentions "halls of crafts or companies, which have not been used to pay any tithes." Every house and hall is to pay tithes *primâ facie*, under this act of parliament, but there are three descriptions of persons who are exempted under the act: first, great men; secondly, noblemen and noblewomen; and thirdly, commercial corporations who have any halls, crafts, or companies. Now this is not that case in any point of view. The defence alledges, first, that the deanery is not within the act at all; secondly, that it is exempted within the act, because it never has paid tithe, and therefore it is to be proved that it has paid tithe before the plaintiffs can recover, as against a person occupying as a great man; or thirdly,

or thirdly, that he has paid tithes from time to time, and therefore within the act of parliament is protected from paying more. First, the defendant states an exemption independently of the act of parliament, notwithstanding which, he next claims an exemption, under the force of the act, and then, abandoning his exemption, he says, he is within the act, because the deanery has paid tithes in point of fact. Now let us consider what the case is with respect to the payment of tithes. Supposing I am wrong in my opinion on the other parts of the case, it is impossible to say he is exempted on the ground of not having paid tithes, for it is quite clear he has paid them. If as an ecclesiastical person, he could be exempted in particular cases, it is quite clear he cannot be exempted upon ground of non-payment. If he is a great man, yet it is clear he has paid. The ground of exemption proceeds on his never having paid, and therefore it is said, that is evidence of his being the person intended under this ct as exempted; but he has paid tithes in point of fact: the evidence is quite clear. I cannot say whether he paid tithes in his own wrong or not, as the argument supposes, for I have no evidence given me to shew that the payment of the tithes was not according to the acknowledged right, a right acknowledged by the deans themselves, but I see payment of tithes from time to time constantly, not only for those things which were charged separately, but charged for the deanery, *quâ* deanery, and the sum of 12*s.* 6*d.* is paid for that for a considerable time, and then I see also what is very extraordinary, when I recollect the argument: I see that sum afterwards doubled, so that in truth the 12*s.* 6*d.* cannot be considered a settled sum to which you are to refer, for I see it is what they were not guided by at the time. In regard to the argument of non-payment, it will be said that the dean bought the public-house

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called the *Feathers* and added it to the deanery, and that the 12*s*.6*d*. is applicable to that. My answer is, that there is no evidence of that. That the *Feathers* was taken into the deanery, I admit, but there is no evidence to shew that the 12*s*. 6*d*. was paid for that house; and the rate is always charged in the book upon *the deanery*, not upon that small part of the premises of the dean, which is only part of the garden; therefore, it seems to me quite clear that the dean comes now under the effect of evidence which shews he has always, as far as the court can see, paid tithes for the deanery, and that at a certain period of time that payment was increased and doubled. The question then is, whether the dean is to pay tithes now? here is no customary payment; I have looked through the answer, and I see it is very candidly stated: it is not stated in the answer to be a customary payment, it comes then shortly to this:—no customary payment, no exemption, but a payment to a certain time of 12*s*. 6*d*. for the deanery, and then that sum doubled. With respect to the 12*s*. 6*d*. it is said to have been paid in the dean's own wrong, and that the doubling was in his own wrong; but of that I see no evidence. It was doubled and continued to be paid in the double shape of £1. 5*s*. down to the time of the present dispute. Then the question is, whether the £1. 5*s*. shall be considered now as the rate on which the warden and minor canons, filling the character of parson, are to obtain satisfaction for the tithes? I confess, I do not know upon what ground that shall be binding upon the warden and minor canons. The meaning of the statute, is beyond all question, to give the tithes at the rate of 2*s*. 9*d*. upon the value. Rent is considered in some parts of it as value: when a person leases property, if he leases it fairly, the minor canons take 2*s*. 9*d*. upon that rent, it being supposed the rent is fairly reserved, may

Under the stat. 37 *H*. 8. c. 12. the incumbents of parishes in *London* are entitled to tithes at the rate of 2*s*. 9*d*. in the pound on the value, and not merely on the rent.

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as it may be fairly concluded that the landlord will take as much as he reasonably can ask upon the lease. But in the present case where there is no letting at all, and where the payment has been *as for tithes*, is that payment (which I cannot consider as a customary payment) to be considered as a perpetual payment? surely that is not within the act of parliament, nor within the cases. There is nothing to which to refer this 12*s*. 6*d*. that can belong to any rent or value fairly set at some time, and which therefore must continue the same; that would have the effect of a customary payment: here there is no rent to refer it to. I see only that there was a payment of 12*s*. 6d. which was increased to £1. 5*s*. Now if you look into the act of parliament, it is quite clear that it was intended to give the rector the same benefit as the rector of any country parish, that he should have the benefit of the depreciation of money; by the 20th section of the statute it is provided, that if any person shall take any tenement for a less rent than it was accustomed to be letten for, by reason of great ruin or decay, burning, or such like occasions or misfortunes, that then such person or persons, his executors or assigns, shall pay tithes only after the rate of the rent reserved in his or their lease, and not otherwise, as long as the same should endure. That is a binding article upon both, but it is only till the end of the lease: when the end of the lease arrives, and the value is raised in consequence of the repairs and improvements of the tenant during the time, then the clergyman is to have his fair tithes upon the rent to be reserved or upon the value, which comes to the same thing, for if the person does not choose to lease, it is not to follow that the clergyman is not to have his tithes, therefore it appears to me to be a case within the act of parliament, and within all the cases upon it.

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upon it. In *Ivatt* v. *Warren* (*a*), the court held, that the inhabitants ought to pay according to the true value the same was worth to be let. The same was determined in *Grant* v. *Cannon* (*b*), and in *Williamson* v. *Gosling* (*c*), all these are referred to in *Antrobus* v. *The East India Company* (*d*). In *Ivatt* v. *Warren*, the court declared, that if the building had been a shed, it ought to be discharged no longer than it continued a shed, and being converted into a dwelling-house, it ought to pay tithe according to the value: and in case the inhabitants have paid fines for their leases, those leases are considered as not governing the clergyman who is not at all bound by the rent. It amounts to the same thing, for if the rent is £10 a year upon a fine of £100, you must of course refer to the real value, for £10 cannot be the value. I think it is impossible to read this act of parliament, or any of the cases decided upon it, without being satisfied what is its true meaning. The clergyman is to have his tithe upon the value, unless the rent is near the value, so as to make it unnecessary to enter into a discussion upon the subject. In *Ward* v. *Hilder* (*e*), the defendant confessed that he had been an inhabitant of the parish of *St. Lawrence Poulteney*, for nine years, and still was a house-keeper there, and that for some of the years he had paid £1. 16*s.* rated and assessed upon him for the dwelling-house, shop, and ground, in lieu of tithes oblations, &c. but for how many years he did not remember, and that after he had lived some time in the parish he found he was over-rated and refused to pay the same; he also confessed, that his house was worth £40 *per annum*,, and that as he was over-rated, he had not paid any tithes for the same for the time in the bill mentioned.

(*a*) *Ante* 88.
(*b*) *Ante* 107
(*c*) *Ante* 152
(*d*) *Ante* 206
(*e*) *Ante* 108

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mentioned. The decree was, that he should pay to the plaintiffs the arrears of the tithes of the said house and premises. He had been rated constantly at £1. 16*s.* and yet when the question came, the court said, you shall pay 2*s.* 9*d.* in the pound upon the rent or value of the house and premises, the same to be rated and valued after the rate of £30. *per annum*, though proved to be of greater value in the cause; the court decreed payment upon £30 *per annum*, not the payment of £1. 16*s.* according to the former payment, but according to that which he admitted to be the fair value: he proved the house to be worth £40. *per annum*, and the decree was, that the defendant should pay 2*s.* 9*d.* in the pound upon the value of the house and premises which appeared to be £40., but the plaintiffs being satisfied with the less sum of £30., the court gave a decree upon that. The payment was charged after the rate 2*s.* 9*d.* in the pound, with costs, "according to the yearly value of the premises." I wish to observe, that in *Gwillim* you have not those last words, "according to the yearly value of the premises," which is a strong expression in the decree itself. We find the same thing done in *Bramston* v. *Heron* (*a*). Whether *Kynaston* v. The *East India Company*, mentioned in *Antrobus* v. The *East India Company*, has been decided in the house of lords, I do not know, I think it is precisely this cas : but if not decided in the house of lords, I would avoid citing it, otherwise than as it shews the general opinion of all the courts to have been according to the construction I put upon the act. The decree in *Antrobus* v. The *East India Company*, was affirmed in the house of lords. I think it is impossible to read that case, (I do not say that it is precisely in point) without seeing that the principles there laid down, apply imperatively to the case now before

(*a*) *Ante* 139.

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fore us. Under these circumstances, I am of opinion, that the plaintiffs are entitled to have their decree in this cause. With respect to the time from whence the decree is to go, I really do not think, that the plaintiffs have made out any case against the defendant; he has said in his letter, that which I think any other person would have said, and in truth, that could only relate to a year before; but I do not think the dean has bound himself by that letter. It is a great mistake to say that a court of equity cannot go beyond six years; this is not the case, although a court of equity generally confines itself to six years, because it is more convenient and more consistent with justice in general, and I should always bind myself by six years, unless I saw reasons to the contrary, which I do not in the present case. I must therefore confine the decree to an account for six years. The dean states in his answer, what he conceives to be the value of the premises; if the warden and minor canons assent to that statement, a calculation of what is payable may easily be made: if there is to be an account of the value of the premises, it must go to the deputy remembrancer to ascertain the value in the usual way of making a decree of that kind. In a case of this sort I feel great reluctance to give costs: they are rare cases, and though I think the principles of the other cases govern this, yet it is a case which may, without being very much considered, be held to be singular. I do not myself think it a very singular case, according to my view of it, but still *prima facie*, it is a new case. If costs have been paid in all the other cases, I shall of course give costs here, but if they have not been given in all the other cases, I will not give them here.

A court of equity is not bound to limit an account of tithes to six years, although it adopts that rule in general.

Note.—It being afterwards ascertained that costs had been given in the other cases, a decree was made with costs.

COMMON

COMMON PLEAS,

MONDAY, JANUARY 21, 1822.

REV. MR. KYNASTON, *v.* THE EAST INDIA COMPANY.

(MSS.)

1822.

The Rev. Mr. Kynaston v. The East India Company.

Mr. *Serjeant* Vaughan stated to the *Jury*, that this case came before them by an issue from the *Vice-Chancellor*, to ascertain the value of certain warehouses in the occupancy of the *East India Company*, that was the letting value for each and every year from *Lady-day*, 1804, to *Lady-day*, 1821. The facts of the case were these.—Mr. *Kynaston*, was the impropriator of the tithes of the parish of *St. Botolph*, which property descended to him as an inheritance, having originally been purchased for £12,000. or £13,000. by one of his ancestors. His grandfather had been for years embarked in litigation upon the same subject, and although the former dispute had been adjusted, yet it was the lot of the present plaintiff to be again embroiled with the *East India Company* respecting the amount of tithes which these particular warehouses ought to pay to

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pay to him as rector of the parish. He was glad that the jury had seen the premises, and were therefore better able to estimate the different valuations which they would this day hear applied to the particular premises in question. As long ago as the 37th year of the reign of *Henry* VIII., in consequence of some disputes between the citizens of *London* and particular rectors, an act of parliament was passed which established a commission of the great officers of state to affix a permanent scale at which the London tithes should be paid for the future. The regulation then established, and ever since acted upon, was this—that for every 10s. of annual rent paid by a tenant for his premises, the tithe payable was fixed at 1s. 4d.; and for every 20s. rent, the sum of 2s. 9d. The *East India Company* not being tenants, but in point of fact, landlords themselves, denied the payment of tithes altogether upon these premises, on the ground that they were not tenants, and therefore without the operation of the act of parliament; but after a long course of litigation, it was decided in the House of Lords, that they were bound to pay the tithe, in the same proportion as if their warehouses were under a different occupancy. In the present case, the litigation between the parties arose out of disputed estimates of valuation upon the fair stowage which the premises contained during their occupation in the years already mentioned. The learned serjeant concluded by stating generally, the amount of tonnage which his witnesses would prove these warehouses were capable of containing. The estimate of valuation, he begged to say, was intended in this case to be affixed retrospectively, and not prospectively.

A document was put in, showing the rate of stowage charged by the *East India Company* to private merchants for storing their goods.

Lord

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Lord *Chief Justice* Dallas, before the case proceded farther, begged to submit generally to the jury the main points to which he thought they ought throughout the trial to direct their attention. *First*, what would these premises produce, if let to tenants annually from the year 1804 to 1821, having reference to the prime cost of the building? He did not mean that the prime cost ought to be considered as a conclusive rule, the *Vice-Chancellor* did not think it was; still it would perhaps, be as well to consider that point also. *Secondly*, what would these warehouses have produced, having reference to the general market-price of warehousing in the *city of London*, for such a quantity of stowage as they were capable of containing? *Thirdly*, was that quantity of stowage obtained with more convenience, and therefore advantage, to the tenant in this particular spot, than it was generally obtainable elsewhere? Was the value to the tenant thereby increased, and what ought to be the additional price in consequence? *Fourthly*, if the substantial character of the building was such as to afford greater security than in the ordinary way against fire, robbery, &c.; and what addition ought on that account to be allowed; and lastly, if they were, from their peculiar character and advantages generally, superior in value to common and ordinary property of that description, and what ought on that account to be allowed?

A *Juror* begged to observe, that he could not see how the prime cost could affect their present valuation; for were he to take stores, he should merely consider present value, and not what they might have cost.

Lord *Chief Justice* Dallas concurred in the opinion of the Juror; but said that it would be as well, after the litigation which had taken place upon this question

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to make the estimate in a variety of ways, so as to convey the best information to the *Vice-Chancellor*.

The first witness was Mr. *John Barrow*, in the house of *Sutton, Halliday, and Co., East India Brokers*, who deposed that the schedule of rates charged by the Company were upon an average with the general charge for warehousing in the city of London. The premises in *Haydon-square* were, in his judgment, the best in *London*.

Moses Brandon, warehousekeeper, was well acquainted with the *East India Company's* warehousing rates, which were upon an average with the general charges for the same in the city of London.

William Perry, clerk to Mr. *Montague*, the surveyor, examined, said that the measurement of the warehouses in question was 3,825,245 cubic feet; this included nothing but storage. The *Haydon-square* premises measured, in addition to the above, 220,951 feet, 9 inches, cube.

Cross-examined.—This calculation did not include counting-houses, or any part not applicable to the stowage of goods.

Joseph Sill, a warehousekeeper and wharfinger, said that he thought the premises worth, in June, 1819, (then forming his estimate from the external appearance of the buildings, for he did not then obtain permission to enter) £11,030. annually. In 1821 he obtained permission to inspect them internally, and had examined them in detail under an order from the Court of *Chancery*, and he then confirmed his former valuation, stating, however, that he thought them worth

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more; but he made no addition, having been desired to be moderate in his valuation. Six shillings for every 100 square feet would make £11,475. 12s. inclusive of two houses which adjoined the warehouses; and £662. 14s. was his valuation of the *Haydon-square* premises. His estimate was not made upon any peculiar advantages which the *East India Company* might derive from stores so situated, for their chartered trade, but upon what he considered the annual rental which there would be no difficulty of obtaining for them generally, if to be publicly let for the purposes of trade. The *Lords* of the *Treasury* had very wisely, as he thought, appointed these warehouses as the receptacle of private trade—he had no doubt that if the Company gave up these warehouses, they would again be taken by the Treasury for the same purpose. But he formed the above value intrinsically, and not upon external or contingent circumstances. He could not say whether in the years 1818 and 1819 he should have found it easy to get tenants at the rate he mentioned; but the sum he had set down was, in his opinion, the fair average value from 1804 to 1821, taking the good and bad years together. The rent charged by the East India Company to private merchants, for warehousing, amounted to double the sum he had set down in his present valuation.

Cross-examined.—He had no doubt that the value he had estimated would be practically obtainable in the market. If they did not bring this price, he should say the trace of London was annihilated. His valuation fairly applied to the average of the last seventeen years: he could not speak to the value with precision for each and every year.

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Lord *Chief Justice* Dallas.—The issue to be tried here, must, if possible, find the value for each and every year.

Mr. *Robert Smith*, wharfinger and warehouseman, had valued these warehouses. His estimate was 11*d.* per ton per week, according to the *East India Company*'s rate of charges for warehouse rent; but he had no doubt that since 1804 these warehouses were worth from £10,000 to £11,000 a-year, at an average of years, between man and man, forming his opinion upon the articles usually contained in them. Their value was enhanced by their capacity to contain a great variety of goods. He estimated the value upon the peace esteblishment: were he to limit it to the years between 1804 and 1814, it would be much higher.

Cross-examined.—A warehouse of five floors, each twelve feet high, was more valuable than one of six floors, each ten feet high, because of the intervening beams choking a proportion of the room. The effect of the establishment of the *London* and *West India Docks* in 1804 did certainly depress the value of up-town warehouses, but not below the estimate of 6*s.* for every hundred cubic feet, liable to all taxes, &c. He made his calculation subject to all depression. He had not made a calculation of the value of such premises to an ordinary tenant, without reference to the goods to be stored; but were the Company to have been about to dispose of the premises in 1804 for a term of twenty-one years, he should have valued them at from £10,000 to £11,000 a year.

Mr. *Frederick Purdey*, a West India broker, acquainted with the value of warehouses, said, that in the years 1813 and 1814 these premises would bring a rental

rental of £13,000 or £14,000 a year. The depression was the lowest from 1804 to 1809, at which period they would not have brought more than £10,000 a year. In 1814 he had no doubt they would have let on lease of fourteen years for £13,000 a year.

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Mr. *Richard Heald* merely proved that the rate of rent for stowage charged by the *East India Company* corresponded with the general market price. He knew there was a depression of value for warehouses from 1804 to 1809, but not since that period.

Mr. *William Goold* proved the rent which the *East India Company* paid for some stores to Mr. *Danberg* to be £1,342 a year; but they only took them for a temporary purpose, and they had the use of the crane, rope, and tacle, and were exempt from all taxes and repairs. They have occupied them at the same rent, from 1807 to the present period, as yearly tenants.

Mr. *Perry* was recalled, and he said, that according to the rate paid by the Company for the last-mentioned premises, which he knew, the value of those now under consideration would amount to £20,000 a year.

Mr. *Joseph Gwinn*, an architect and surveyor, estimated the value of these warehouses at £11,908 yearly rent, and described the particulars of which his valuation was composed. From 1804 to 1821, year by year, he thought this their value to any tenant.

Mr. *Lang* valued them at the same yearly rent as the last witness.

The plaintiff's case was closed.

Mr.

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Mr. *Sergeant* Lens then addressed the jury for the defendants, and said that the real question here was, what value these premises would have brought if let to any ordinary tenant in the general market during the years between 1804 and 1821. Neither party was, he thought, required to specify the actual yearly sum for each of the seventeen years; the general average amount would, he thought, satisfy all parties, if ascertained upon a safe and reasonable rule of calculation—not such as the *East India Company* ought to pay for the convenience of their particular goods, and with their particular privileges and advantages; but such as any ordinary tenant could pay in the market, were these premises to be let, as others for private use. He should produce witnesses, who, not acting in their estimate of valuation upon antecedent hypotheses, but upon plain practical effect, would state more reasonable and applicable conclusion which they had drawn from the ordinary occurrences in the market, in the letting of common warehouses in the city of *London*. He denied that what the Company paid under particular circumstances for extra warehouses was a fair criterion; neither was their own rate of charge for warehouse rent, because the parties paying it had all the advantage of their goods being available for the East India sales. He should now call witnesses, who would, upon the soundest principles, show that these premises were not worth half the sum estimated on the part of the plaintiff.

Mr. *Samuel Cochrane*, the architect of the *East India Company*, estimated the value of these premises, which he had surveyed at different times; they had varied in their extent during the years stated. Carefully applying the principles of valuation laid down by the *Vice-Chancellor*, and looking at the general qua-

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lity and character of the building, the space upon the floors, the height, &c. his valuation of the warehouses in *Cutler-Street* was £4,970. the houses there £300. and the warehouses in *Haydon-Square* £300. making a total of ££5,570. a-year—that he thought the real value at a fair market price. The building had been repeatedly injured by overloading, and exposed to frequent repairs, and he had remonstrated against the mode of loading which was pursued by the servants of the Company, and the pitching down packages, which opened the beams of the floor. He did not think the height of the floors an advantage generally in the market, though it might in particular cases only, such as stack-pile, to the *East India Company*. The cubic measurement already stated included (improperly as he thought) the beams. In his conscience he believed he could not have got more than £5,570. a-year for these premises, from any ordinary tenant in the market.

In his cross-examination, he said that he thought the superficial, rather than the cubical admeasurement should be the rule of calculation in such a case as this. He believed these warehouses had been well-occupied by the *East India Company*, and that they had last year built additional warehouses, and occupied them for the purposes of their trade: the new buildings were of the same high dimensions as the old ones, to correspond with the original structure: he should not have built the floors so high, were he erecting detached warehouses. Twenty-seven shillings by the hundred square feet upon the superficies of the floor, was his ratio of calculation, without any regard to the height. His estimate excluded cubical admeasurement. About eight feet were considered the ordinary height of floors; these were certainly higher: more than ordinarily necessary height was useless.

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Re-examined.—His superficial admeasurement comprehended every spot of stowage on the premises.

Mr. *John Shaw*, surveyor, knew these warehouses, and with reference to the principles laid down in the Vice-Chancellor's judgment, had considered their yearly value, which exactly corresponded with that given by the last witness, and upon the same principle, namely, the superficial contents of each floor applicable to stowage, including the useful height necessary for ordinary purposes; extra height was a great disadvantage; 6000 feet by 10 high, would, in his opinion, be more valuable than 5,000 by 12. Were he called upon to let such premises, he should certainly have recommended their being let at the valuation he had already affixed.

In his cross-examination he said he was not much in the habit of letting warehouses. There was no item in his valuation to comprehend height, for that would constitute a cubical admeasurement; but they did not lose sight of height in forming their value, for they saw that the premises were high enough for any purpose—height above six feet six was of no use for general purposes.

Mr. *Pilkington*, architect, estimated the value of these premises with the two preceding witnesses, and his value exactly corresponded with theirs.

Mr. *J. Winstanley*, auctioneer, was well acquainted with the general value of warehouses, and had surveyed the premises in question. His estimate of their value was an annual rent of £5,025, taking an average from 1803 downwards, drawn from his knowledge of what other property of a similar kind let for in the market.

market. He should have been satisfied with such a rent, had he had them to let in the ordinary way.

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In his cross-examination, he assimilated those warehouses to others which he had let in the course of his business, at the rate of rent he estimated in his present scale of valuation.

Mr. *G. Shuttleworth*, auctioneer, was conversant in the value of warehouses in general; had surveyed these, and estimated their annual value at £5,453, deducting £15 *per cent.* for various contingencies, which would reduce the annual rent to £4,667. He thought the height of these particular warehouses was injurious; and his estimate was merely formed with reference to the ordinary and useful height.

Cross-examined.—There were no other warehouses of the same description as these in London, and his judgment was formed upon a comparison with the letting price of others, not of a corresponding description. He had, however, made his estimate upon the best principles he could form.

Mr. *Charles Hoggart*, auctioneer, had also surveyed these premises, and his valuation was £4,150 annual rent; but this sum merely applied to its value last year. Such extensive premises could not be brought all at once into the market, without a depreciation of their real value. His estimate had no reference to the value of this property for a series of past years.

Mr. *M. Lucas* knew these warehouses, and valued them at £6,300 annual rent. The dock-acts had certainly materially depressed the general value of warehousing property. The depression commenced in

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1802, but was more sensibly felt in 1805, when the London Docks opened. The vuluation of £6,300 a year he really deemed excessive, and could not, he thought, have been easily got for them between the years 1804 and 1821. Had he had them to let during that period, he should have gladly closed with such an offer.

Mr. *John Drinkall* estimated the value of this property at £4,700 average annual rent.

The evidence being closed on both sides,

Mr. *Serjeant* Vaughan was heard in reply.

Lord *Chief Justice* Dallas summed up the evidence to the jury, who retired at half-past four, and after remaining out for a few minutes, returned with a *verdict that the annual value of all the premises was £7,000, from the year* 1804 *to the year* 1821.

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27. The sums assessed are to be paid to the parsons, &c. at the four most usual feasts of the year, or within fourteen days after each feast. *s.* 9 21

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54.

54. Defendant to a Bill for Tithes puts himself upon one Modus in his defence and proves another. There must be a Decree against him. *ib.*

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2. The rate according to the amount of which the payment for such Tithes is to be computed is 2*s.* 9d. in the pound on the fair yearly rent, or actual annual value of the Premises to be let, as in the case of all other houses paying Tithes. *ib.*

3. The maxim *ecclesia ecclesiæ decimas solvere non debet*, does not apply to the circumstances under which the Dean of St. Paul's is connected with the Warden and Minor Canons, as Parson of St. Gregory; it is confined to the Clergy of the *same Church*. *ib.*

4. The Dean is not within the meaning of the exemption of the Act, a great man. *ib.*

5. Where there has been no new Lease granted for many years, the Clergy of London are to be paid for their Tithes at the expiration of the old one, according to the improved annual value; and when any fine is paid on taking a new Lease, in consideration of which the annual rent is reduced, the amount of such fine is to be taken into the calculation of the estimate of the yearly value. New houses on old scites are liable according to the actual annual value. *ib.*

6. New houses built on old scites, which have never paid any Tithes, are liable to pay Tithes after the rate of 2*s.* 9*d.* in the pound on the improved annual value. *Kynaston, v The East India Company* 251

On a bill brought for tithes of houses in *London*, after the rate of 2*s.*9*d.* in the pound of yearly rent, according to the statute 37 Hen. 8, The court directed an issue to try, whether less than that sum had ever been paid, though there was no proof of any regular modus. *Bennet v Trepass.* 125

Bill filed for tithes in London after the rate of 2*s.* 9*d.* in the pound, under 37 H. 8 in respect of buildings belonging to the East India Company, no present rent paid for these buildings, rent and tithes paid at various periods since 1660, for some of the houses that formerly stood on the scite of the present buildings set forth in the pleading; and as to other former buildings, no rents nor payments of tithes could be shewn; no specific invariable customary payments alleged, and none of the stated payments carried up to the time of the act and decree, held that 2*s.* 9*d.* in the pound must be paid on the improved value of the premises. *East India Company v Antrobus.* 221

Decree for tithes in *London* at 2*s.* 9*d.* in the pound, under the statute 37 Hen. 8 c 12. The occupiers not proving any certain customary payment in lieu of tithes; which payment will exempt an individual house if usually made a sufficient time to acquire the character of customary; though within time of memory, and not general through the place or parish. *The Warden and Minor Canons of St. Paul's v Ketile.* 191

Mere non payment of the tithes

under the statute is not an answer, as it would not be to the claim of tithes at common law. *The Warden and Minor Canons of St. Paul's v Kettle.* *page* 191

An issue refused under the circumstances, 1st misspleading; the defendants not stating customary payments by their answer, but adopting *ore tenus*, payments disclosed by the answer to their cross bill, instead of moving for leave to file a supplemental answer, 2ndly The improbability of establishing those payments after two unsuccessful trials at bar in another cause. *The Warden and Minor Canons of St. Paul's v Kettle.* *ib.*

Warehouses, &c. in *London* occupied by the owners are chargeable for Tithes under 37 H. c. 12, according to the improved value there being no condition of any letting. *Kynaston* v. *East India Company.* *page* 251

It was no defence to a claim made by the impropriator of that part of the parish of St. *Botolph* without *Aldgate*, in the County of *Middlesex*, for 20s. a year, in lieu of Tithes of a house in East Smithfield, that the ground on which it stood was part of the possessions of a Monastry, and so tithe free. *Kynaston* v. *Hattersley.* 148

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